THE READING OF The Famous and Learned Robert Callis, Esq;

Upon the Statute of 23 *H.* 8. *cap.* 5.

OF

SEWERS:

As it was delivered by him at *Gray's Inn*, in *August*, 1622.

The Second Edition, inlarged with the several Judgments and Resolutions of the Reverend JUDGES upon the Laws of Sewers, and other Remarks not before published.

With a New and Exact Table to the Whole.

Qui omnes tangit ab omnibus supportari debet.

LONDON,
Printed by *M. Fleſher*, for *Thomas Baſſet*, at the *George*, near *Clifford's Inn*, in *Fleet-ſtreet*. 1685.

Antiq. d. E. 1685

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OF

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Robert Callis, Esq;

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SEWERS:

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Qui emunt tangit ab omnibus sequenteri debet.

LONDON,
Printed by Ed. Phillips, for Thomas Basset, at the George, near Clifford's Inn, in Fleet-street. 1695.

BODLEIAN

TO THE READER.

THIS learned piece is so Well known, and hath already found so kind entertainment, that there will be little need to recommend it: The Laws of Sewers whereof it treats are of general concernment, as well to inland Counties through which Rivers run, as to maritime, and their use and importance is such, as without the due execution of them, we should be exposed to the rage and violence of that mercileſs Element which surrounds us, Rivers would by Impediments and Annoyances be obstructed in their courses; Bridges, Calceys, Havens and Ports would fall to decay; in a word, the Gates which now open and let in commerce, and the Ways that convey and lead it through the Kingdom would fail us.

The Authour was a Gentleman of excellent parts, both natural and acquired, and had attained to great knowledge in the Laws of this Realm, which were his Profession; And being for many years a Commissioner of Sewers in his native Countrey of Lincolnshire, which abounds in vast Fens and Marisbes, he particularly applied himself to the study of these

Laws of Sewers, and made choice to read upon the Statute of 23 H. 8. cap. 5. *whereon that Commission is principally grounded.*

Wherein how far he hath outgone all others who have written of that subject, with what judgment and politeness he hath handled as well several points at the Common-law, as the several branches of this Statute, and how he hath rendred the most dark, difficult and knotty parts thereof plain and intelligible, will easily appear to the discerning Reader.

That which is added in a larger letter, will it's hoped prove not unacceptable; Here and there is a touch upon some points controverted by our Authour; and the rest gives you the Judgments and Resolutions of the Reverend Judges upon the Laws of Sewers, some of them before his time, but not then made publick, and others since wherein care hath been taken that nothing should be omitted that could be found pertinent to this subject.

However our Authour hath this right done him, that nothing is imposed on him but what was his own, the Additions being sufficiently distinguished by the Character.

ERRATA.

PAge 57. l. 9. for *H.* 8. reade *H.* 4. Margent *ibid.* p. 76. l. 24. for *Ports*, r. *Parts*. p. 93. l. 22. for *reparia*, r. *riparia*. p. 94. l. 30. for *contagious*, r. *outragious*. p. 104. l. 10. for *c.* 14. *c.* 18. l. 21. for *Calu*, r. *Callu*. p. 110. l. 23. for *is*, r. *is*. p. 116. l. 14. r. *ought to be*. p. 172. l. 7. for *Secreed*, r. *denied*.

The *

* This probably refers to "The chiefest matters" which used to occur at this point, now superseded by the Table at end.

¶ *A general Act concerning Commissions of Sewers to be directed in all parts within this Realm.*

OUR Sovereign Lord the King, like a vertuous and most gracious Prince, nothing Earthly so highly weying as the advancing of the common profit, wealth and commodity of this his Realm, considering the daily great damages and losses which have happened in many and divers parts of this his said Realm, as well by the reason of the outragious flowing surges and course of the Sea, in and upon marsh grounds and other low places heretofore through politick wisedom won and made profitable for the great Common-wealth of this Realm, as also by occasion of Land-waters and other outragious Springs, in and upon Meadows, Pastures and other low Grounds adjoyning to Rivers, Flouds, and other Water-courses. And over that, by and through Mills, Mill-dams, Weres, Fishgarths, Kedels, Gores, Gotes, Floudgates, Locks and other impediments, in and upon the same Rivers and other Water-courses, to the inestimable damages of the Common-wealth of this Realm, which daily is likely more and more to encrease, unless speedy redress and remedy be in this behalf shortly provided: wherein albeit that divers and many provisions have been before this time made and ordained, yet none of them are sufficient remedy for reformation of the Premisses: Hath therefore by deliberate advice and assent of his Lords Spiritual and Temporal, and also his loving Commons in this present Parliament assembled, ordained, established and enacted, that Commissions of Sewers, and other the premisses shall be directed in all parts within this Realm from time to time, where and when need shall require according to the manner, form, tenor and effect hereafter ensuing, to such substantial

23 H. 8. c. 5.

BIBLIOTHECA BODLEIANA

Cantial and indifferent perſons as ſhall be named by the Lord Chancellor and Lord Treaſurer of England, and the two chief Juſtices for the time being, or by three of them, whereof the Lord Chancellor to be one.

The form of the Commiſſion of Sewers.

Henry the Eighth, &c. Know ye, that foraſmuch as the Walls, Ditches, Banks, Gutters, Sewers, Gotes, Calcies, Bridges, Streams, and other defences by the coaſts of the Sea, and marſh ground being and lying within the limits of A, B or C. in the County or Counties of or in the borders or confines of the ſame, by rage of the Sea, flowing and reflowing, and by mean of the trenches of freſh waters deſcending and having courſe by divers ways to the Sea, be ſo dirupt, lacerate and broken, and alſo the common paſſages of Ships, Balengers and Boats in the Rivers, Streams, and other Floods within the limits of A, B or C, in the County or Counties of or in the borders or confines of the ſame by mean of ſetting up, erecting and making of Streams, Mills, Bridges, Ponds, Fiſhgarths, Mill-dams, Locks, Hebbing-wears, Hecks and Floudgates, or other like lets, impediments, or annoyances, be letted or interrupted, ſo that great and ineſtimable damage for default of reparation of the ſaid Walls, Ditches, Banks, Fences, Sewers, Gotes, Gutters, Calcies, Bridges and Streames. And alſo by mean of ſeting up, erecting, making and inlarging of the ſaid Fiſhgarths, Mill-dams, Locks, Hebbing-wears, Hecks, Floudgates and other like annoyances in time paſt, hath happened, and yet is to be feared, that far greater hurt, loſs and damage is like to inſue, unleſs that ſpeedy remedy be provided in that behalf.

The ſeveral cauſes of awarding the Commiſſion of Sewers.

What things the Commiſſioners of Sewers are authoriſed to doe.

We therefore for that by reaſon of our dignity and prerogative royal we be bound to provide for the ſafety and preſervation of our Realm of England, willing that ſpeedy remedy be had in the Premiſſes, have aſſigned you and ſix of you, of the which we will that A, B and C ſhall be three to be our Juſtices to ſurvey the ſaid Walls, Streams, Ditches, Banks, Gutters, Sewers, Gotes, Calcies, Bridges, Trenches, Mills, Mill-dams, Floudgates, Ponds,

Ponds, Locks, Hebbing-weirs, and other impediments, lets and annoyances aforesaid, and the same cause to be made, corrected, repaired, amended, put down or reformed, as case shall require after your wisedoms and discretions, and therein as well ordain and doe after the form, tenor and effect of all and singular the Statutes and Ordinances made before the first day of March, in the three and twentieth year of our Reign, touching the premisses, or any of them, as also to enquire by the oaths of the honest and lawfull men of the said Shire or Shires, place or places, where such defaults or annoyances be, as well within the Liberties as without (by whom the truth may the rather be known) through whose default the said hurts and damages have happened, and who hath or holdeth, any Lands or Tenements, or common of pasture, or profit of fishing, or hath or may have any hurt, loss or disadvantage, by any manner of means in the said places, as well near to the said dangers, lets and impediments, as inhabiting or dwelling thereabouts by the said Walls, Ditches, Banks, Gutters, Gotes, Sewers, Trenches and other the said Impediments and Annoyances. And all those persons, and every of them to tax, assess, charge, distrain and punish, as well within the metes, limits and bounds of old time accustomed or otherwise, as elsewhere within our Realm of England, after the quantity of their Lands, Tenements and Rents, by the number of Acres and Pearches, after the rate of every Persons Portion, Tenure or Profit, or after the quantity of their common of pasture, or profit of fishing, or other commodities there, by such ways and means, and in such manner and form, as to you or six of you, whereof the said A, B and C to be three, shall seem most convenient to be ordained and done for redress and reformation to be had in the premisses: and also to reform, repair and amend the said Walls, Ditches, Banks, Gutters, Sewers, Gotes, Caseles, Bridges, Streams, and other the premisses, in all places needfull: and the same as often, and where need shall be to make new, and to cleanse and purge the Trenches, Sewers and

Inquiry by whose defaults the annoyances come.

Assessing the persons to be contributory to the charge.

and ditches in all places neceſſary. And farther, to reform, amend, proſtrate and overthrow all ſuch Mills, Streams, Ponds, Locks, Fiſhgarths, Hebbing-wears, and other impediments and annoyances aforeſaid, as ſhall be found by inquiſition, or by your ſurveying and diſcretions to be exceſſive or hurtfull. And alſo to depute and aſſign diligent, faithfull and true Keepers, Bailiffs, Surveyers, Collectors, Expenditers, and other Miniſters, and Officers for the ſafety, conſervation, reparation, reformation and making of the premiſſes, and every of them, and to hear the account of the Collectors and other Miniſters, of, and for the receit and laying out of the money that ſhall be levied and paid, in and about the making, repairing, reforming and amending of the ſaid Walls, Ditches, Banks, Gutters, Gotes, Sewers, Calcies, Bridges, Streams, Trenches, Mills, Ponds, Locks, Fiſhgarthes, Floudgates, and other impediments and annoyances aforeſaid. And to diſtrain for the arrearages of every ſuch collection, tax or aſſeſs, as often as ſhall be expedient, or otherwiſe to puniſh the debtors and detainors of the ſame, by fines, amerciaments, pains, or other like means after your good diſcretions. And alſo to arreſt and take as many Carts, Horſes, Oxen, Beaſts, and other inſtruments neceſſary, and as many Workmen and Labourers, as for the ſaid works and reparation ſhall ſuffice, paying for the ſame competent wages, ſalary and ſtipend in that behalf: and alſo to take ſuch and as many Trees, Woods, Under-woods and Timber, and other neceſſaries, as for the ſame works and reparations ſhall be ſufficient at a reaſonable price by you or ſix of you, of the which we will that A, B and C ſhall be three to be aſſeſſed or limited as well within the limits and bounds aforeſaid, as in any other place within the ſaid County or Counties near unto the ſaid places: and to make and ordain Statutes, Ordinances, and proviſions from time to time, as the caſe ſhall require, for the ſafeguard, conſervation, redreſs, correction, and reformation of the premiſſes, and of every of them, and the parts lying to the ſame neceſſary and behooveſull, after the laws and cuſtoms

Appointing of Bailiffs, Collectors, Surveyors, and other inferior Officers.

Diſtraining for the arrearages of the money aſſeſſed.

Taking of Labourers, Workmen, Carriages, Timber, and other neceſſaries.

To make Statutes and Ordinances.

of Romney-marsh, in the County of Kent, or otherwise, by any ways or means after your own wisedoms and discretions. And to hear and determine all and singular the premisses, as well at our suite, as at the suite of any other whatsoever, complaining before you or six of you, whereof A, B and C shall be three after the laws and customs aforesaid, or otherwise by any other ways and means after your discretions. And also to make and direct all writs, precepts, warrants, or other commandments by virtue of these presents, to all Sheriffs, Bailiffs, and all other Ministers, officers, and other persons, as well within liberties as without, before you or six of you, whereof the said A, B and C to be three, at certain days, terms, and places to be prefixed, to be returned and received. And farther to continue the process of the same, and finally to doe all and every thing and things, as shall be requisite for the due execution of the premisses, by all ways and means after your discretions. And therefore we command you that at certain days and places, when and where you, or six of you, whereof the said A, B and C to be three, shall think expedient, ye do survey the said walls, fences, ditches, banks, gutters, gotes, sewers, calcies, ponds, bridges, rivers, streams, water-courses, mills, locks, trenches, filhgarths, floudgates, and other the lets, impediments, and annoyances aforesaid, and accomplish, fulfill, hear and determine all and singular the premisses in due form, and to the effect aforesaid, after your good discretions; and all such as ye shall find negligent, gainsaying, or rebelling in the said works, reparations or reformation of the premisses, or negligent in the due execution of this our commission, that ye do compell them by distress, fines and amerciaments, or by other punishments, ways or means, which to you or six of you, whereof the said A, B and C shall be three, shall seem most expedient for the speedy remedy, redress and reformation of the premisses, and due execution of the same. And all such things as by you shall be made and ordained in this behalf, as well within liberties as without, that ye do cause the same firmly to be observed,

Awarding of Writs and Precepts to Sheriffs, Bailiffs, and others.

To compell others to obey their orders.

doing

doing therein as to your Justices appertaineth, after the Laws and Statutes of this our Realm, and according to your wisedoms and discretions. Saved always to us such fines and amerciaments as to us thereof shall belong. And we also command our Sheriff or Sheriffs of our said County or Counties of that they shall cause to come before you or six of you, of the which A, B and C shall be three, at such days and places as ye shall appoint to them, such and as many lawful men of his or their Bayliwick, as well within the liberties as without, by whom the truth may best be known, to inquire of the premisses; Commanding also all other Ministers and Officers, as well within Liberties as without, that they and every of them shall be attendant to you in and about the due execution of this our Commission. In witness whereof we have caused these our Letters patents to be made. Witness our self at Westminster the day of in the year of our Reign.

A commandment to the Sheriff to return before the Commissioners such Jurors as shall be expedient for inquiry.

All other Officers shall be attendant unto the Commissioners.

And it is also enacted, that every such person as shall be named Commissioner in the said Commission, after he hath knowledge thereof, shall effectually put his diligence and attendance in and about the execution of the said Commission. And before he shall take upon him the execution of the said Commission, he shall take a corporal oath before the Lord Chancellour, or before such as unto the said Lord Chancellour shall seem the king's Writ of Dedimus potestatem, to take the same, or before the Justices of the Peace in the quarter Sessions holden in the Shire where such Commission shall be directed: the tenor of which oath hereafter ensueth.

The Commissioners shall take an oath.

¶ Ye shall swear that you to your cunning, wit and power shall truly and indifferently execute the authority to you given by this Commission of Sewers, without any favour, affection, corruption, dread or malice to be born to any manner of person or persons: and as the case shall require, ye shall consent and endeavor your self for your part to the best of your knowledge and power to the making of such wholsome, just, equal and indifferent laws and ordinances,

The Oath of the Commissioners for Sewers.

dinances, as shall be made and devised by the most discreet and indifferent number of your fellows being in Commission with you for the due redress, reformation, and amendment of all and every such things, as are contained and specified in the said Commission: and the same laws and ordinances to your cunning, wit and power cause to be put in due execution, without favour, meed, dread, malice or affection, as God you help and all Saints.

And it is also enacted by the authority aforesaid, that all and every Statute, Act and Ordinance heretofore made concerning the premisses, or any of them, as well in the time of our Soveresgn Lord the King, that now is, as in the time of any of his progenitors Kings of this Realm of England, not being contrary to this present Act, nor heretofore repelled, from henceforth shall stand and be good and effectual for ever, and to be put in due execution according to the true meaning and purport of the same. A confirmation of other Statutes.

And over that be it enacted, that the Commissioners hereafter to be named in any of the said Commissions according to the purport and effect of the same Commissions, have full power and authority to make, constitute, and ordain laws, ordinances and decrees, and further to do all and every thing mentioned in the said Commission according to the purport, effect, words and true meaning of the same: and the same Laws and Ordinances so made, to reform, repell and amend, and make new from time to time, as the cause necessary shall require in that behalf. The authority of the Commissioners.

Provided always, and it is enacted, that if any person or persons being assessed or taxed to any lot or charge, for any Lands, Tenements or hereditaments, within the limits of any Commission hereafter to be directed, do not pay the said lot and charge according to the Ordinance and assignment of the Commissioners, having power of the execution of the said Commission: by reason whereof it shall happen the said Commissioners having The power of the Commissioners in case of refusal to pay.

having power of execution of such Commission, for lack of payment of such lot and charge to decree and ordain the same Lands, Tenements and Hereditaments from the owner or owners thereof, and their Heirs, and the Heirs of every of them, to any person or persons for term of years, term of life, in fee simple or in taile for payment of the same lot and charge, that then every such Decree and Ordinance so by them made and ingrossed in parchment, and certified under their Seals into the King's Court of Chancery, with the King's royal assent [illegible] the same, shall bind all and every person and persons [illegible] the making of the same Decree had any [illegible] Lands, Tenements or Hereditaments in use, possession, reversion or remainder, their Heirs and Feoffees, and every of them, and not to be in any wise reformed, unless it be by authority of Parliament hereafter to be summoned and holden within this Realm.

Decree.

The Commissioners Decree shall bind the King's, and all other mens Lands.

And also it is provided by authority aforesaid, that the same Laws, Ordinances and Decrees to be made and ordained by the said Commissioners or six of them by authority of the said Commission shall bind as well the lands, tenements and hereditaments of the King our Sovereign Lord, as all and every other person and persons and their heirs for such their interest as they shall fortune to have, or may have in any Lands, Tenements or Hereditaments, or other casual profit, advantage or commodity whatsoever they be, whereunto the said Laws, Ordinances and Decrees shall in any wise extend, according to the true purport, meaning and intent of the same Laws.

No man may sit being unsworn.

And also furthermore by the authority aforesaid established and enacted, that if any manner of person or persons of what estate or degree soever he or they be of, that from henceforth doth take upon him or them to sit by virtue of any of the said Commissions, not being before sworn in form as is aforesaid, and according to the tenor of the oath before specified. Or if any person so

named

named and sworn be fit, as is aforesaid, not having Lands and Tenements, or other hereditaments in fee simple, fee tail or for term of life, to the clear yearly value of forty marks above all charges to his own use, except he be resiant and free of any City, Borough or Town Corporat, and have moveable substance of the clear value of one hundred pounds, or else be learned in the laws of this Realm in and concerning the same, that is to say, admitted in one of the four principal Inns of Court for an utter barrester, shall forfeit forty pounds for every time that he shall attempt so to doe; the one half thereof to be to our Sovereign Lord the King, and the other half thereof to the use of him or them that will sue therefore, by action of debt, bill, plaint or information in any of the King's Courts: in which action or sute no wager of law shall be admitted, nor any essoin or protection shall be allowed. And if any action of trespass or other suit shall happen to be attempted against any person or persons for taking of any distress, or any other Act doing by authority of the commission, or by authority of any Laws or Ordinances made by vertue of the said commission; the defendant or defendants in any such action shall and may make aboway, cognizance or justification for the taking of the same distress or other Act doing, touching the premisses, or any of them, alledging in such aboway, cognizance or justification, that the said distress, trespass or other Act, whereof the plaintiff complaineth, was done by authority of the commission of sewers for lot or tax assessed by the said commission, or for such other act or cause, as the said defendant did by authority of the same commission, and according to the tenor, purport and effect of this present Act made the xviii. year of the reign of our Sovereign Lord King Henry the eighth, without any expressing or rehearsal of any other matter or circumstance contained in this present Act, or any Commission, Laws, Statutes, or Ordinances thereupon to be made,

What Land each Commissioner shall have.

Utterbarrest.

Avowry, or justification of a distress taken by reason of the Commission of Sewers.

Where the Defendant shall recover damages, with his costs of suit.

Wages for Commissioners, Clerks, Collectors, &c.

Commissions within the liberty of the Duchy.

in

Charge of the Commission.

A Commission of Sewers shall indure three years.

How long the Commissioners Decrees shall stand good.

Provided always, that such Laws, Acts, Decrees, and Ordinances, as shall happen to be made by the said Commissioners according to the tenor of their Commission, or by authority of this Act, shall stand good and effectual, and be put in due execution so long time as their Commission indureth and no longer: except the said Laws and Ordinances be made and ingrossed in Parchment, and certified under the Seals of the said Commissioners into the King's Court of Chancery, and then the King's royal assent be had to the same: any thing contained in this present Act to the contrary hereof notwithstanding.

Commissions into Wales, or a County Palatine.

Provided also, that whensoever, and as often as such Commission, as is alone limited, shall be made and hereafter in any person or persons for the reformation and amendment of or in any of the premisses specified in the said Commission, within the seas, liberties and possessions of the principality of Wales, the County Palatine of Chester, or within the seas, liberties and possessions of any other place, where there is liberty and jurisdiction of County Palatine, that in every such case two Commissions shall be awarded, and made according to the tenor of the Commission above expressed, one thereof under the great Seal of England, and the other under the usual Seal of the County Palatine, in manner and form, as is above provided for the Duthy of Lancaster; any thing above rehearsed in this present Act to the contrary notwithstanding.

Wales. Chester.

A Commission of Sewers shall inure three years.

And it is provided and also enacted, that the royal assent limited to be had unto the Laws and Ordinances to be made by the said Commissioners, as is above said, shall be certified into the said Court of Chancery under the Kings privy Seal: and that there shall not any sum of money be paid for the said privy Seal, but for the writing of the same Certificate under the said privy Seal shall be paid to the writer thereof ii. s. and not above, nor no other, nor greater sum for any thing touching

The King's Royal assent shall be certified into the Chancery.

or concerning the same certificate under the same privy Seal.

Provided always, that the Chancellours, and such other as shall have the custody of the Seals of the said principality of Wales, or the County Palatine of Chester, or within the fees, liberties and possessions of any other place, where there is liberty and jurisdiction of County Palatine, upon reasonable request, and upon the sight of the Commission under the King's great Seal of his Chancery, shall without delay make out another Commmission under the Seal of the said County Palatine according to the tenor of the King's Commission to them shewed under his great Seal. And to those Commissioners as shall be named by the Lord Chancellour, Lord Treasurer, and the two chief Justices, or by three of them, whereof the Lord Chancellour, to be one, except it be within the fees and liberties of the Duchy of Lancaster, within which fees and liberties the Commissioners shall be named, and Commissions made, as is afore obtained by this Act: any thing contained in the said Act, or in any proviso thereunto added and annexed to the contrary thereof notwithstanding. This Act to endure for twenty years. Stat. 3 E. 6. & made perpetual.

¶ *An Act concerning the Oath of Commissioners of Sewers.*

23 H. 8. c. 10.

BE it enacted by the authority of this present Parliament: That the first late made for Sewers, and the Commission therein recited, shall be extended, used, and put in execution in the Town and the Parches of Calis, according to the tenour of the same Commission in like effect as it is enacted to be put in execution within this Realm, and that no person shall be compelled to be sworn or otherwise bound to sit or travel in execution of any Commission of Sewers within this Realm, unless that he be dwelling within the County whereof he is or shall be assigned to be a Commissioner, and for Calis and the said Parches thereof, unless that he be dwelling within the same Town of Calis, or Parches.

Calis.

Commissioners of Sewers dwelling in the same County.

¶ And because that divers persons heretofore assigned to be Commissioners have refused to be sworn, according to the said former Act, whereby divers Commissions heretofore made, remain hitherto without effectual execution: Be it therefore enacted, that if any person assigned or to be assigned, to be such Commissioner of Sewers, being required hereafter by such person or persons as have or shall have authority by the King's writ, or otherwise, to receive or accept the oath comprised in the said former Act, every person that so refuseth to take the same oath, or upon that request made, do not receive the same oath, and that refusal or contempt done in the Chancery, or returned into the Chancery with the said writ, shall loose and forfeit for the same contempt to the King our sovereign Lord, five marks, and so to loose from time to time five marks for every such contempt, as shall be done or returned into the said Chancery against any such persons, unless that he in the same

The forfeiture of a Commissioner of Sewers who refuseth to take the Oath appointed by the Statute of 23 H. 8. 5.

same Chancery do shew and allege, in the said term, wherein such return shall be made against him, sufficient and reasonable matter and cause to be allowed by the Lord Chancellour for his excuse and discharge in that behalf.

¶ *An Act for the continuance of the Statute of Sewers.*

WHere in the Parliament holden at Westminster, by protogation the fifteenth day of *January*, in the three and twentieth year of the most victorious reign of our late Sovereign Lord King *Henry* the VIII. among other things, one general Act concerning Commissions of Sewers, to be directed into all parts within this Realm, was enacted and made to continue and endure for twenty years then next following, as by the same Act more at large it doth and may appear: and for as much as the same Act is thought good and beneficial for the Commonwealth of this Realm, Be it therefore enacted and ordained by the King our Sovereign Lord, with the assent of the Lords spiritual and temporal, and the Commons in this present Parliament assembled, and by the authority of the same, that the said Act, and all clauses, articles, and provisions, in the same contained, shall continue and indure in their force and strength, and to be observed and kept for ever, in such manner and form, as shall and may stand with the sequels and additions hereafter mentioned.

3 & 4 Ed. 6. cap. 8. The Statute of 23 H. 8. 5. touching the Commission of Sewers made perpetual.

And be it further enacted and established by the authority aforesaid, that all scots, lots, and sums of money hereafter to be rated, and taxed, by vertue of such Commission of Sewers, upon any the Lands, Tenements, or Hereditaments of our Sovereign Lord the

All sums of money taxed by force of the Commission of Sewers upon any of the King's

Lands shall be leviable by distress.

the King, his Heirs or Successors, for any manner of thing or things, concerning the Articles of the said Commission of Sewers, shall be gathered and levied by Distress, or otherwise, in like manner and form as shall or may be done in the Lands, Tenements and Hereditaments of any other person or persons, and that all bills of acquittance, signed with the hand or hands of such Collector or Receiver, as shall have the collection thereof by the appointment of the said Commissioners, or six of them, shall be as well a sufficient discharge, to the Tenants, Farmers, and Occupiers of the same Grounds, so to be charged for the said sum, wherewith their Grounds shall be so charged, as also a sufficient warrant to all and every the receivers, auditors, and other whatsoever officer or officers of our said Sovereign Lord the King, his Heirs and Successors, for the allowance to such Tenant, Farmer, or Occupier for the same: Adding moreover unto this Act, by the authority of this present Parliament, that such, and like fees, and none other, nor more, shall be at any time paid or demanded, for any commission, or commissions, or writs of Dedimus potestatem, hereafter to be sued out, or obtained under the seal of the Duchy, but onely such, and like fees as be mentioned in the said former Act, to be paid in the Chancery, for Commissions and Writs of Dedimus potestatem, to be obtained from the same Court of Chancery. Adding moreover thereunto by the authority aforesaid that every Commission and Commissions, hereafter to be awarded for Sewers, shall continue and endure for term of five years, next after the Teste of such Commission, unless the same Commission and Commissions, shall be otherwise discharged, within the same by Superfedeas, any thing or things mentioned or contained in the said former Act, contrary to the additions before mentioned, or any of them, in any wise notwithstanding.

What fees shall be paid for the Commission of Sewers sued out under the Seal of the Duchy.

How long the Commission of Sewers shall endure.

¶ An

¶ *An Act for the Commission of Sewers.*

FOrasmuch as no Commission of Sewers, by the Statutes heretofore made, may have continuance above the space of five years: Be it therefore enacted by the Queen's most excellent Majesty, with the assent of the Lords spiritual and temporal, and the Commons in this present Parliament assembled, and by the authority of the same, that from henceforth all and every Commission and Commissions of Sewers, now standing in force, or that hereafter shall be granted and made, shall stand and continue in force for the term of ten years, next ensuing the date of every such Commission, unless the same Commission or Commissions be, or hereafter shall be repealed, or determined by reason of any new Commission in that behalf made, or by supersedeas: and that all such Laws, Ordinances and Constitutions as be, or shall be duly made by force of any such Commission, according to the tenour and effect limited in any former Statute heretofore made, touching Commission or Commissions of Sewers, and being written in Parchment indented, and under the Seals of the said Commissioners, or six of them, whereof the one part shall remain with the Clerk appointed, and to be appointed for the Commission of Sewers for the time being, and the other part in such place as the same Commissioners, or six of them, shall order and appoint: shall without any Certificate thereof to be made into the Court of Chancery, and without the Royal assent to the same had, stand and continue in full force and effect; notwithstanding any determination of any such commission by supersedeas, untill such time as the same Laws, Constitutions and Ordinances shall be altered, repealed, or made void, by the Commissioners after to be assigned and appointed for Sewers, in those

13 Eliz. c. 9.

A Commission of Sewers shall continue ten years.

The Orders of Commissioners of Sewers shall be of force without the Certificate of them, or the Royal Assent.

parts, where the same Laws, Ordinances and Constitutions were made, ordained and constituted, or by six of them.

The Commissioners of Sewers Orders shall continue, though the Commission do expire.

And be it further enacted by the authority aforesaid, that at all times from and after the end and expiration of the term of ten years, next insuing the date or teste of any commission of Sewers hereafter to be made, all such Laws, Ordinances and Constitutions, as were made by virtue of any such Commission, and written in parchment, indented and sealed, as is above-mentioned, without certificate thereof, or the assent royal to the same had as is aforesaid, shall notwithstanding the determination of any such Commission by the expiration of the term of ten years next insuing the date of any such Commission of Sewers, likewise continue in force, for and by the space of one whole year then next insuing: and that the Justices of peace of the Shire and Shires where the same Laws, Ordinances and Constitutions are to be executed within their several commissions and limits, or six of them, whereof two to be of the Quorum, shall have power and authority, by the space of one whole year next after the expiration of every such Commission, to execute the same Laws, Ordinances and Constitutions, and every of them, as fully, and in as ample manner and form, as the Commissioners or any of them named and appointed in every or any Commission so expired might or should have done, to all intents and purposes, as if the said Commission or Commissions had continued in force.

The Justices of Peace may for one year execute the Commission of Sewers, which a new Commission be granted.

Provided always, and be it nevertheless enacted, that if any new Commission of Sewers shall be made within the said year, that then immediately from and after such Commission newly made and published, the power of the said Justices of the Peace, and every of them, in any-wise concerning the execution of any such Laws, Ordinances, and Constitutions of Sewers, shall utterly cease: Any thing or things in this Act to the

the contrary expreſſed in any wiſe notwithſtanding.

And be it farther enacted, that no Farmer or Farmers, for term of years, of any Manors, Lands, or Tenements, lying or being within the Precincts or Limits of any ſuch Commiſſion of Sewers, which be, or hereafter may be ordered and chargeable by any Laws, Ordinances, or Conſtitutions, made or to be made by vertue of any ſuch Commiſſion, wherein he or they ſhall be named or appointed Commiſſioner or Commiſſioners, not having Eſtate of Freehold within the Realm of England, of, or in Manors, Lands, or Tenements, of the yearly value of forty pounds, ſhall at any time hereafter, have power to ſit, or in any wiſe intermeddle with the execution of ſuch Commiſſion or Commiſſions, during the time he or they ſhall continue, or be ſuch Farmer or Farmers of any ſuch Manors, Lands or Tenements, and ſhall not have Eſtate of Freehold, as is aforeſaid: but that every ſuch Commiſſion, as having reſpect onely to every ſuch perſon or perſons, for ſuch and ſo long time as he or they ſhall ſo be and continue Farmer or Farmers of any ſuch Manors, Lands or Tenements, ſhall be deemed and adjudged in Law to be void, and of none effect: Any thing in the ſame Commiſſion, or any Statute or Law heretofore made to the contrary notwithſtanding.

A Farmer of Lands chargeable ſhall not be Commiſſioner within the ſame Precinct.

And be it further enacted by the Authority aforeſaid, that from henceforth the ſaid Commiſſioners, nor any of them, ſhall not be compelled, nor compellable to make any Certificate or return of the ſaid Commiſſions, or any of them, or of any their Ordinances, Laws or doings, by the authority of any the ſaid Commiſſions, nor ſhall not have any fine, pein, or amerciament ſet upon them, or any of them, or any ways to be moleſted in Body, Lands, or Goods, for that cauſe.

There ſhall be no Certificate or return of the Commiſſion.

And yet nevertheleſs, to the intent the Queen's Majeſty our Sovereign Lady, her Heirs and Succeſſours, may be at all times hereafter truly anſwered of all ſuch Iſſues,

Fines, and Amerciaments, as shall happen, grow, or be forfeited by virtue of any such Commission, or by the execution thereof: Be it also enacted, that the Clerk and Clerks appointed, and hereafter to be appointed, for and in any such Commission, or Commissions of Sewers, shall yearly truly estreat all the said Issues, Fines, Penalties, Forfeitures and Amerciaments, that shall be due and answerable to her Highness, her Heirs and Successours, and the same Estreats shall yearly deliver into the Court of the Exchequer, at such time and times, and in such manner and form, as Justices assigned to and for the conservation of the Peace in any Shire should or ought to doe by virtue of their Commission, upon pain to forfeit to our Sovereign Lady the Queen, her Heirs and Successours, for every default in that behalf made, five pounds.

The Fines and Amerciaments shall be estreated into the Exchequer.

Provided always, that it shall be lawfull for any Commissioner, being also a Farmer, and not having Lands and Tenements, to the clear yearly value of forty shillings of Freehold, to sit by virtue of the said Commission, and have his voice and full authority with others to make and establish Ordinances for Sewers, according to the tenour of the Commission touching and concerning all Lands and Tenements within the precinct of every such Commission, other than such Lands and Tenements as he or they, for the time being, held and injoy as Farmer, as he or they might have done before the making of this Statute; Any thing therein contained to the contrary notwithstanding.

In what case a Farmer of Lands chargeable may be a Commissioner.

Lectura Prima.

MY moſt worthy Fellows and Companions of this noble and renowned Society, the Hourglaſs of my puiſne time is run, and I am now come to take poſſeſſion of your Reader's place; wherein I muſt hazard to your cenſures the fortunes of my inability: Theſe twenty and ſix years compleat I have had continuance here, and in that time I have onely taken the meaſure and length of your Hall: And herein I acknowledge *Grays Inn* to be the Patron of my beſt fortunes, and your ſelves the beſt Companions of my forepaſt and preſent life. I made a queſtion, when it came to my turn to reade, whether I ſhould turn therefrom or not, being then troubled about Two things, *Charge* and *Care*, both which I put into a pair of Scales, wherein I thought *Charge* weighed heavy and ſolid (for *ibi ponebantur ſolidi*) *Care* notwithſtanding had his equal weight with the other, and poiſed the Scales even: Yet I conſidered the ſmall Subſtance I had got came by my Profeſſion, I therefore tooke my ſelf bound in Credit and Conſcience bound to undertake this burthenſome place, for the maintenance and preſervation of the honour of this Houſe; and with that I put *Charge* and *Care* in one Scale, and *Reſolution* in the other, which ſealed them both up. Twenty years likewiſe of my laſt paſt time, I have in the practice of my Profeſſion ſpent, but I hope, little conſumed thereof; In which time I launched forth my Ship (*In profundum Maris*) for a Voyage to the Sea, and now ſhe is returned to your Shoares, furniſhed and balliſt with Merchandize of ſeveral eſtimates: By my Ship I mean my Statute which I reade on, which be the Laws of

Shewers;

Sewers; the Merchandize be the weighty matters therein contained: By the Governours and Rulers of this Ship, I mean the grave and prudent Commissioners who are put in charge and trust with the execution of these Laws: By the Mariners, I intend the Officers of this Law; the Merchants place I reserve unto my self: The Wares brought home be of divers sorts, some onely fit for the Imperial Majesty of a King, and these be Royal Prerogatives, shewing forth their splendour like the *Flower de Luce* in the Crown; others belong to high Nobility, and some be usefull for the homely Commonalty; the rest which shall remain, I have cast under Hatches for my last days Mart, when I mean to make chaffer on them all. But though I seem to make these Markets of my Legal Merchandize, yet I do not mean to set such Rates upon them as Merchants use to do, which be all for (*utile dulce*) for I onely set one price upon all, which is your kind acceptance. Marvell not, I pray you, at these my Sea-like salutations, for this day I am become God *Neptune's* Oratour, and I mean to display the power of his Empire; for my Statute, my Cases, and my Argument, will all depend upon the Element of Water, over which, as Poets feign, *Neptune* hath chief predominance. Well, now my Ship is at shore, and I have cast Anchor there, and to my great comfort I see many Chapmen attending the Market, and therefore now presently I will unlock, and set open the Closet of my Store, which be contained in the fair Volumes of the Law, and especially in that Law made and enacted in the Parliament held in the 23*d* year of *Hen.* the 8*th*, cap. 5. which is *A general Act concerning the Commissioners of Sewers for all the Realm of* England.

The causes wherefore I made choice to reade upon this Law, be five in number; *Viz.*

1. *First*, For the Antiquity of these Laws of Sewers, though this Statute bear date but 23 *H.* 8.

Secondly,

Secondly, For the largity and extent thereof, which appears in the ſtyle of this Statute, and there termed, *A general Act for all the Realm of* England. 2.

Thirdly, For the neceſſary uſe thereof, which continual practice and daily experience teacheth us. 3.

Fourthly, I have had a more deſire to reade upon theſe Laws, becauſe never any Reader did heretofore undertake the ſame; and upon peruſal of this Statute, and upon due conſideration taken of others, I thought I could not make my choice of a more fitting, and more neceſſary Law, nor more profitable for my Native Countrey of *Lincolnſhire*, and other Maritime Places of this Kingdom, than this is. 4.

And *Fifthly*, His Majeſty's general care, which theſe Laws require at his hands, and his ſpecial care, by the which his Highneſs of late hath taken theſe Laws into his gracious and provident protection. 5.

And upon due conſideration taken of all theſe Caſes, I reſolved to proceed in the expoſition of this Statute, being made perpetual by the Statute of 3 *Ed.* 6. *cap.* 8.

And to ſpeak ſomething of the three firſt cauſes, I am of opinion for the Reaſons and Authorities enſuing, That the Laws of Sewers have been, and be of great antiquity, and have told over as much time, and as many years as any other Laws of this Realm have done: For as Mr. *Cambden* in his *Britannia* ſaith, *Quod inſula Britannia avida in mare sumi ex parte ſe projecit*; Therefore this Realm adjoining on every ſide upon the Sea, could not be ſafe without thoſe provident Laws made and uſed for the defence thereof. Antiquity of theſe Laws. *Cambden.*

And although it is ſaid in Scripture, That Almighty God hath bound the Seas by the word of his Commandment, and had ſhut up the Deep, and ſealed it with his terrible and glorious Name; yet God, who beſtowed wiſedom on man, it was his pleaſure he ſhould providently uſe it over the reſt of the Creatures, not giving way that In *Manaſſes* Praye. King of *Judah.*

he

he should be remiss or presumptuous in any thing, which by his foresight or judgment might be prevented, helped and relieved.

Genesis, c. 7. It is true, that at the Flood, *Cum cataractæ Cæli fuerint apertæ*, when the Windows of Heaven were by God's determinate will set open, and that the Seas did *Suum excedere modum*, no power of man's hand could stay the swallowing and devouring surges of the Seas and Waters; yet then notwithstanding had God appointed that his Servant *Noah* and his Children, and such Creatures as he appointed, should be preserved by the Ark, which was a work of their own hands: Therefore the Laws of God and Nature have appointed man to make provision for the necessary defence and safety of himself, and of his Country: And the Lawes of this Realm, most of which have received their *primum effugium* from the Divine Laws of the Almighty, and have fetched their Pedigree from the Laws of Nature, have *à principio* been so predominant in this Kingdom of England, that they have never been wanting at any time to provide for the safety thereof.

And if the Register be so ancient a Book as Sir *Edward Coke* in one of his Epistles hath there declared it to be, then it may give satisfaction in this kind, that these Laws of Sewers were in those times of great antiquity and authority. For there I find two several Writs of Commissions of that nature. The one authorizing certain Persons to survey the defences in the Parts of *Holland* in the County of *Lincoln*. The other for the viewing and surveying of the surrounded Grounds lying between the two Rivers *Humber* and *Ancholme* in the said County of *Lincoln*. And the first of the said Commissions is set down *verbatim* in *Fitz. nat. brev. fol.* 113. Yet the first Statute which appears to us in print, wherein the frame of a Commission of Sewers is set down, is the Statute of 6 *H.* 6. *cap.* 5. Yet I make no question but the said Commissions expressed in the Register, and *Fitz. nat. brev.* were in their forms long before the Sixth time; and that the Statute of *Henry* the Sixth

Register in Oyer and Terminer.

Fitz. nat. brev. fol. 113.

6 H. 6. c. 5.

Sixth adds ſome more power and ſtrength thereto than was before, having backt them with the power of the Parliament; and it is ſomething additional in matter, as it was in power, as by both the Commiſſions compared together is apparent.

I do likewiſe find in the 38*th* of *Edward* the Third, *Lib. Aſſ. plac.* 15. That a Commiſſion was awarded to inquire of Bridges, and of the repairs thereof, which is a branch of theſe Laws: And Sir *Edward Cook* in his 10*th* *Report* in the Caſe of the Iſle of *Ely*, ſaith, That the Kings of this Realm, before the making of any Statute of Sewers, might grant Commiſſions for the ſurveying and repairing of Walls, Banks and Rivers, and other Defences. And of the ſame opinion is the Book of Sir *John Davies* in his *Iriſh Reports*, in the Caſe of the Royal Piſcary of the *Banne*. And Sir *Edward Cook* hath in his firſt Caſe ſet the firſt Statute of Sewers to be in time the 9*th* of *Henry* the Third, which is in *Magna Charta* the Firſt Volume of Statutes, and the moſt ancient that be extant in our Laws.

38 Ed. 3. lib. Aſſ. pl. 15.

Sir John Davy's Reports.

9 H. 3.

By all which is manifeſt, that theſe Laws have been received into the Government of this Realm, in time as ancient as any other were; And I am the rather herein confirmed, for that in the ancient Commiſſion expreſſed in the Regiſter aforeſaid, there be theſe words, That the King *Ratione dignitatis ſuæ regiæ ad providendum ſalvationi regni ſui circumquàque fuit aſtrictus.* Wherein it is hereby made plain, That the King by the Tenure and Prerogative of His Crown, was bound to ſee and foreſee the ſafety of this Realm; and ſo this Law is a Prerogative Law, and ſeems to be as ancient as any Laws of this Realm, and all Prerogatives be without limitations of time; Neither can it be preſumed, that all or any Kings till the time of *Henry* the Sixth were ſo improvident as to want theſe Laws, without the which the Realm could not be defended from the violence of that unmerciſull Enemy the Sea; wherein I do conclude, That theſe Laws of Sewers be as ancient as any other Laws of this Kingdom be.

The extent of this Law.

For the extent of this Law, the Title of this Statute shews it, viz. *A general Act for granting Commissions of Sewers within the Realm*, without any word of Restraint, other than these (*where need should require.*) And although Expounders of the Laws be not tied to make the Title their Text, either for the body or the bounds of it, yet it may serve to give some direction in the Exposition thereof: But to make the Title to be the ground in the material Exposition of the Law, may lead the Expositor many times into errour: For in *Stradling* and *Morgan's* Case in *Plo. Com.* the Title of the Statute was, *For the true answering for the Revenues of the King*, and the words in the body did extend the same to the Receivers of Subjects; but there the Judges and Expounders of that Law went with the Title in a Statute made in the 23d of *Elizabeth*, the Title of the Statute was *For Politick Constitutions for the Navy*; and in that Statute there was a new Fish-day provided, which no man would have looked for under such a Title.

Stradling and Morgan.

23 *Eliz.*

And *Lucian* an ancient Greek Poet compiled a Book, and in the Frontispiece thereof Inticuled the same *A Book of True Reports*; where looking into it, there was not any thing true therein: So it appears though in Acts and Books the Titles and Styles may give help in the Exposition, and may serve as an Index or Table to find out the matter, yet it is not fit to relie upon them, but that they may be used or refused as occasion shall serve.

Howsoever there is better concord betwixt the Title and the Body of my Statute, for the *Corps* of the Act perform as much as the Title promised, whereby the Inland Countries of *Nottingham*, *Northampton*, *Huntington*, *Bedford* and the like, may have the use of this Statute as well as the Maritime Countries of *Lincoln*, *York*, *Cambridge*, *Norfolk*, *Suffolk*, *Kent*, *Sussex*, *Hampshire*, *Devon*, *Cornwal*, *Glocester*, *Chester* and *Lancashire*, if not in all, yet in part, as hereafter I shall make it appear in my second Lecture upon this Law.

And although both the Statute of 6 *H.* 8. and the Regiſter, and *Fitz. Nat. Brev.* make all of them mention in thoſe Commiſſions of the County of *Lincoln*, and of no other County; yet doubtleſs the Law-makers and Judges of this Realm, and the Expoſitours did intend then, and did extend them to all the Parts and Counties of the Realm. And yet I take it, that the firſt Original and the chief uſe of theſe Laws, was in the ſaid Maritime Countries, which ſtood in moſt need thereof, and eſpecially *Lincolnſhire*, where be the huge great and vaſt Fens and Mariſhes: but yet notwithſtanding they may ſerve generally for all the Realm of *England*, as the extent of this Statute I reade on hath bounded them.

So herein my concluſion is, that the extent of this Statute is as large as the Realm of *England*.

The neceſſary uſe of it.

From the Title I am now come to the Preamble of this Statute, where the words be very ſolid and weighty; that is, *That the King nothing earthly ſo highly weighing as the advancing the common Profit, Wealth and Commodity of this Realm:* By the which it may appear, That the making of this Law was of all other thought to be moſt neceſſary, and of greateſt conſequence, when the King preferred the ſame before any earthly thing: And the King's care herein became his Royal Perſon very worthily, becauſe by this Statute Safety was brought to the Realm, and Wealth and Profit to the People thereof; greater and better fruits than which, no humane Law can produce: And the chief execution of this Law was moſt aptly left to the King, *Ratione regiæ dignitatis ſuæ*, whoſe Office doth, as the Philoſopher truly ſaith, contain in it great Vertue, high Underſtanding, and Divine Wiſedom, to whoſe high Government, as well our Perſons as our Laws be committed, and the defence thereof is applied to his grave foreſight.

And truly I have taken upon me to reade on thoſe Laws of Sewers, as Mr. *Marrow* did in former times take upon him

him to expound in his reading the Laws of the Justices of Peace, hoping this work of mine may prove as acceptable to the Commissioners of Sewers, as that of his was beneficial to the Justices of Peace; the use whereof being no less commodious to the Commonwealth than that of the Peace, being both general Laws of great use and esteem, and my self being for many years past a Commissioner in the County of *Lincoln*, I found that these Laws were dark and intricate, and came not usually within the reach and understanding of such as were not well seen and studied in the Laws.

And because I found the use of them to be wondrous necessary, I did intend, when occasion served me, to break the Ice, and enter seriously into the exposition of them. And therefore seeing these Laws being in time most ancient, in extent most large, and for the use most necessary, I have, with your kind favour, made choice of them to frame my Reading upon; wherein, if upon your perusal you find any scapes or errours, which may soon fall from Opinion, *hæc amicè corrige*, and such of them as you shall bestow your liking upon, *hîc utere meum*; and this shall suffice touching my choice made of this Statute.

And as I have formerly declared and delivered the causes which stirred me up, and the reasons which confirmed me to reade upon this Statute; Now I do intend to break it up, and I do divide it into these several branches or parts:

1. *First*, To make provision to resist the overflowing of the Sea upon the large Marsh-grounds lying in the Maritime Countries, which commonly be the surest for soundness, the greatest for compass, and the best for profit of all the Sheep-walks and Commons of this Realm, which take prejudice and loss onely by the rage of the Sea.

2. *Secondly*, To provide also that the great fresh Rivers and Streams may have their passages made clear, and that their Walls, Banks, and other Defences be repaired, kept and maintained, whereby the fair, delightfull, pleasant and fruitfull

fruitfull Meadows and Pasture-grounds which lie in the greatest abundance upon or near the Rivers, Brooks and Streams may be preserved from the inundation of fresh Waters, which many times annoy them, to the great and inestimable damage of His Majesty's Subjects, which be Owners and Farmers thereof.

Thirdly, Whereas Navigation, both for the Exporting of our Homebred Commodities, and for the Importing of Foreign Merchandizes is the chief inriching of this Nation, therefore Ports, Havens, Rivers, and other Navigable Streams and their dependencies, be put within the defence of this Law, being *Ostia & fauces Regni*, for that by the maintenance of these the Wealth of this Realm is increased, and the Inland Cities, Boroughs and Towns are made partakers with ease and small cost of the Sea's Commodities. 3.

Fourthly, likewise this Law giveth redress and remedy for the removing of such lets and impediments as are either hinderances to Navigation, or stops whereby the abundant Waters cannot have their free passage to the Sea. 4.

And *Fifthly*, Because in the surrounded Grounds there be most commonly the greatest use of Bridges, Calceys, Passages and Ways, therefore this Statute hath taken order for them also, whereby His Majesty's People may in those places for their persons and their goods have both *Salvum & securum conductum*. 5.

In these five parts be all the whole materials of this great and worthy Law contained; and therefore according to the said division I have framed a Case for the first Lecture upon this Law.

The first Case.

A. Leaseth to *B.* a Manor on the Sea Coasts for years, which hath *incrementum & decrementum Maris* by prescription in the County of *Chester*, and the City there, (where a Commission of Sewers is) remainder to *C.* in Fee, Livery is given and taken by Attornies at full Sea within

within the Haven; the Sea then leaves one hundred Acres of Land with the Islands divided in part from the continent by a Navigable Haven; The Lease expired, C. enters, the Prince ejects him, and the King seizeth this Relinquished Ground.

My Opinion is, That the King hath a part, the Prince a part, and the Subject a part of this Ground; and that it is all within this Statute, but no part thereof within this Commission.

Points of the Common-law.

The Points of this Case be three at the Common-law, and five by this Statute.

1. *First*, Whether Livery of Lands may be made within the view in another County, or not?

2. *Secondly*, Whether Livery by the view may be given or taken by Attornies, or not?

3. *Thirdly*, Whether in this case Livery and Seisin may be made by Attornies, or that of necessity it must be made to the Lessee for years, and who must join in making of the Letter of Attorny to take the Livery? All which Points I must maintain affirmatively, else C. the Subject cannot have any Lands at all.

Points on this Statute.

1. *First*, Whether the English Seas be within this Realm of *England*, and what interest the King hath there, and what interest a Subject may have therein by custome and prescription, and what is meant by the said words, *incrementum & decrementum Maris?*

2. *Secondly*, Whose these new Islands be which arise there, and whether they be said to be within the Realm, and what Laws govern the same; for that it appears in my Case, that the Ground left between the Sea and the Haven is an Island?

3. *Thirdly*, Whether the King shall have all the Grounds by His Prerogative, or the Subject by the said Prescription, or the Prince as participating of both? or whether every one shall have a part thereof, according to my Conclusion?

Fourthly,

Fourthly, Whether the Grounds left by the Sea be within this Statute and Commission, both or either of them, or neither of them? 4.

Fifthly, What a Haven, a Shore, and the Coasts be in definition, and the several properties thereof? 5.

The Reader's Argument.

And as it comes to my turn, I intend to maintain the conclusion of my Case: And first of the first Point.

Livery and *Seisin* is one of the most ancient approved Ceremonies of the Law which hath been used for conveying of Lands; and the Law hath a more respect thereto than to any other: And it cannot be denied, but that it is the most perfect form of any, by the which the freehold and Inheritance of Lands is transferred from one to another, and all Subjects may give and take Lands by this Ceremony; but the King onely is excepted, whose Prerogative, is such That as Lands cannot be taken from him, as King, but by Record; so Lands cannot be given or granted to him, as King, but by Record: And in the same degree is a Count Palatine in his County, because he hath there *Jura Regalia*: And this *Livery* and *Seisin* may be actually and really done and performed, or else it may be done within the view of the Lands intended to be conveyed.

And as touching *Livery* and *Seisin* to be actually effected, if the Feoffment contain Lands in two several Counties, and *Livery* and *Seisin* be made in one County in name of both, this will not pass the Lands in another county, because the Land passeth by the Livery, which is local, and not by the Deed.

But in an exchange of Land in two several Counties by Deed, the same is good, for there the Land passeth by the Deed.

But if one make a Feoffment of a Manor lying in Demesn in the County of *L.* and in services in the County of *M.* those services, and so Rents, will pass by attornment of the Tenants, though they lie in a foreign County; and

ſo of an Advowſon appendant, and ſuch like, becauſe thoſe rents and ſervices paſs not by the local Ceremony of *Livery* and *Seiſin*, but by the Ceremony of Attornment, which is perſonal; and depends upon the perſon which is tranſitory; wherein I take this difference, That if a Feoffment be made of a Manor by Parol, the Advowſon appendant, Villains Regardant, and Rents and Services by Attornment of Tenants, will not paſs to the Feoffee, till the demeſne and Lands be firſt conveyed.

But if the Feoffment be by Deed, then the Rents and Services will paſs by Attornment of the Tenants, and delivery of the Deeds, before *Livery* and *Seiſin* be made to paſs the demeſne.

Then ſeeing that Land in one County will not paſs by Feoffment by expreſs Livery made in another County; if then the ſame may be paſſed and conveyed by Livery within the view, is the queſtion of our Caſe: And in my opinion they may, becauſe it is a Ceremony performed by the eye, which is a member or inſtrument which hath his operation by aſpect, *Tam procul quam prope*.

But expreſs *Livery* and *Seiſin*, which is done by the hand, cannot in reaſon be extended to another place than where the body is: And although the eye be fixed in the head, annexed to the body, yet like the Sun, his beams are carried afar off.

And this Livery by the view, is not a Livery in the County where the body is, but properly in the County where the Land lay, which was the object of the eye; and in this caſe it is ſaid to be Livery onely, and not *Livery* and *Seiſin*, becauſe the *Seiſin* is properly when the party enters, and the entry of the party is that which perfects the work, which is in *proprio reſultatu*. And for authority in the point, 28 *Ed.* 3. *fo.* 11. there is a Caſe according to my opinion, where the Huſband at the Church door, when he was to take one to wife, he made a Deed of Feoffment of Lands lying in another County to the ſaid woman, and then delivered the Deed to her, and ſhewed her the Land, then

28 E. 3. f. 11.

then they married, and he entred in claiming to her use; and these Lands were thereby well conveyed to the said woman by this Livery within the view, in another County.

And of the same opinion (that livery may be given of Lands in another County within the view) is *Coke*, 1 Inst. 48. *b*.

Now it is fit to be declared, what view is sufficient, for there be two manner of views, The one general, the other special: In the special view, every particular piece of ground is to be seen; but in the general view it sufficeth to take notice of the grounds by the place they lie in: and in my opinion, The general view in my Case will suffice. For if one make a Feoffment in Fee of a whole Island, or of a whole Manor or Town, and make Livery thereof within the view, this is good; and yet it is not possible to view every particular piece of ground at once, for Trees, Houses and Hills might so be interposed, that the view could not be taken of some part thereof, yet notwithstanding view of the rest will pass.

Also if Lands be covered with Water, Ice or Snow, these will pass well in a Feoffment or Livery in the view.

In *Brook Title View plac.* 101. the Case there may give the rule to our Case; for there it is said in a Writ of view, It is not necessary that all particulars in *Specie* should be put in view, but to see the fields where the grounds lie promiscuously it will suffice, and is a good and perfect view. *Brook* 101.

Sed est un auter diversitie concernant veiwe Carsi un fait Feoffment de B. *acre que gist del auter parte dum Mountaine tout hors del veiwe, la livery de ceo nest bone sans expres veiwe tamen tout voile passer per veiwe de parte & sic in mon case ou part' gist south le flond del mere ceo non obstant passe ut parcel del mannor.*

Ascuns aver teneus & ceo Knightley pur un in 28 H. 8. *in Dier que Livery deins le veiwe doit touts soits este fait in cases de necessity ceo urging in respect del chose ou del person, del chose* 28 *H.* 8.

 quia

quia leterre gist del furder side dun grand ewe en, in le ewe en ne puit este facile accesse del person, quia que le Feoffor ou Feoffee soit lame ou infirme, & detraher ceo in question Jeo aye mist mon case quia le Feoffment & Liuerey fuit ad plenitudinem mariti tamen Jeo sue de opinion que Liuerey deins le veiwe puit este fait sans ascun matter de necessity ceo urging & ceo Jeo collect per le liuer de 42 Ed. 3. Fitz. Feoffments 54. when the Son did give back the Lands to his Father as freely as his Father had formerly given the same to him; and this was within the view: and it doth not appear that either this Livery or the other made to the said woman in 28 *Edward* 3. were made of any necessity urging the same.

42 Ed. 3.

And there be some persons which can neither give nor take by Livery within the view, and that is where the Feoffor or Feoffee is blind: So a Major and Commonalty, Dean and Chapter, or other corporate and politique capacities cannot give or take within the view. Some have held a difference that a Parson of a Church might not take by Livery within the view to him and his Successors, because that came to him in his politique capacity, which had no Eyes; but if he were seized in the right of his Church, that he might infeoff *I. S.* thereof by Livery within the view, because this was a wrong to the Church, and therefore was in the power of his natural capacity, which had Eyes.

A. Contrar.

But the main Point in my Case is, Whether Livery within the view may be given and taken by Attorneys; and whether the view is so incident to the person, that it cannot be imparted to another.

It is true, that the personal view cannot be lent to another, or divided from the person, no more can the personal touch or act of my hand be imparted to another; and yet express Livery, which is the Deed and act of the hand, may be done *per auter maine.*

7. Reports, *Englefield's* Case.

Sir *Francis Englefield's* Case in the seventh *Report* of Sir *Edward Cook*, gives us a pretty difference, where the act to be done

done is inſeperably tied to ones perſon, and where not; as in the Caſe of *Thomas* Duke of *Norfolk*, where upon conveyance of divers Manors to *Philip* Earl of *Arrundel* his Son, there was a Proviſo, That the Duke might revoke the ſame upon ſignifying of his mind under his own proper hand in writing, &c. This power of Revocation was not transferred to the Queen by the Attainder of the Duke, becauſe it was inſeperably tied to his own proper hand: But the principal Caſe there of *Engleſield*, where the Lands were ſetled upon his Kinſman, with power, That upon tender of a Ring by him he might revoke the uſes, and this was forfeit by his Attainder, and the Queen by a Letter of Attorny made to two, did tender the Ring; for this was not preciſely or literally tied to *Engleſield*'s perſon, no more than payment of Money, or ſuch like. Cane. in *Comb*'s Caſe.

And ſo in our Caſe, though by the Law I take it that Livery within the view muſt be in the view of both the Parties, yet this may be done by Attornies; for as my own hand is not preciſely tied by the Law to an expreſs livery, no more is my own eye expreſly tied to this view.

And we ſee in views in an Aſſize, the Under-ſheriff, or the Sheriff's Bailiffs, by his direction, may make the view; and yet the Writ is directed to the Sheriff to doe the ſame; and in thoſe Caſes an intellectual view will ſerve, as if the Jurours know the Land; but ſuch an intellectual view will not ſerve in a Feoffment, but there the view muſt be actual. 36 *H.* 8. *Dyer Morſe* and *Pennington*'s Caſe.

Yet I take this difference, that if a Letter of Attorny be directed to *A. B.* to make *Livery* and *Seiſin*, he cannot doe the ſame within the view, for therein he doth not purſue his Warrant; but if the Letter of Attorny be ſpecial, to give or take Livery within the view, I am of opinion, then the Livery may in ſuch a caſe be given and taken by Attornies within the view, as well as in *Combe*'s Caſe in Sir *Edward Cook*'s 9th *Report*, where it is affirmed that a ſurrender of a Copihold may be given and taken by Attor-

nies, which is as personal as this is in the taking part, because Fealty ought to be made.

Some things may in this Case be farther alledged in this third point, which I now have in hand, that is, Who must make the Letter of Attorny on the Feoffee's part, whether the Lessee for years, or he in the remainder, or both of them: For Lessee for years, it is to be noted, that his Estate hath not any perfection thereby, and he seems himself but a Deputy, and if so, then a Deputy cannot make a Deputy; but yet he is not merely a Deputy, for if there be two Lessees, the remainder in fee to *J. S.* one of the Lessees may take the *Livery* and *Seisin*; yet if a Letter of Attorny be made to two jointly, one of them cannot take it; and if in our case the Lessee had died before entry, the Livery might have been made to his Executours, and powers and authorities cannot be apportioned and come to Executours in such manner; *Ergo*, It is more than a power of a Letter of Attorny for the reasons aforesaid, and for these insuing: For the Lessee for years cannot be prohibited from taking his Livery by the Lessor, but a Letter of Attorny may be countermanded; yet the Lessee alone cannot make this Letter of Attorny, neither can he in the remainder make the same, because he could not himself accept of the present Livery, neither can he meddle with the present possession which a *Livery* and *Seisin* yields.

But I am of opinion, That Lessee for years, and he in remainder, must join in the Letter of Attorny for these Reasons:

1. *First*, They were both one party to the Deed, so ought they to be to the Letter of Attorny, which is to give life thereunto.
2. *Secondly*, They be but in Law one Tenant.
3. *Thirdly*, They should join in Advowry.

And in many Cases the Lessee shall have aid of him in remainder for the privity between their Estates; and although the Lessee gets no Estate by the Livery, yet he assists

ſists himſelf thereby with the aid and ſtrength of him in the remainder, and the Livery goes through his Eſtate, and ſo paſſeth into the remainder.

Therefore my Concluſion is, that they ſhall join in this Letter of Attorny; and hereby I ſuppoſe I have conveyed a good Eſtate in the Manor to *J. S.* in the remainder, to maintain my poſition for him in the end of my Caſe, and here I end my Three Common-law Points, and now am come to the Statute.

Notwithſtanding what is here affirmed for Law, it ſeems doubtfull whether this Livery within the view was well given: For,

1. My Lord *Coke* 1 Inſt. 49. *b.* puts this very Caſe, *viz.* A man makes a leaſe for years to *A.* the remainder in fee to *B.* and makes livery within the view; and he concludes that ſuch livery is void: For it muſt be preſuppoſed (as my Lord *Coke* doth) that the livery is made to the Leſſee for years, as by Law it ought to be; for the livery could not be made to him in remainder, becauſe the Poſſeſſion belonged to the Leſſee for years. And though the livery be not neceſſary in this caſe for the Leſſee himſelf, yet 'tis for the benefit of him in remainder. Now ſuppoſing it to be made to *A.* Leſſee for years, ſuch livery is void, if made onely within the view, becauſe no man can take by force of a livery within the view, but he that taketh the Freehold himſelf, which *A.* doth not. 1 Inſt. 49.

And as for the giving of livery in this caſe within the view to *B.* to whom the remainder in fee is

is

is limited, as well as to the Leſſee for years. It is confeſſed here that he in the remainder cannot accept of the preſent livery, (though it ſhall enure to his benefit) ſo that the joining him in the Letter of Attorny with the Leſſee for years, cannot make the livery within the view good; ſeeing he is incapable of taking it, for that he hath not the Poſſeſſion.

2. If livery to *A.* Leſſee for years, given to him perſonally within the view were good, yet it ſeems doubtfull whether an Attorny can give or take ſuch livery within the view, though the Letter of Attorny be ſpecial to that purpoſe: for if the Law allows not of any ſuch livery by an Attorny within the view, as my Lord *Coke*, 1 Inſt. 52. *b.* ſeems to be of opinion, where he ſaith, that the Warrant is intendable in Law of an actual and expreſs livery, and not of a livery in Law, and cites for it *Tarbam's* Caſe, 3 *Eliz.* then without queſtion the ſpecial direction of the Party to give livery within the view, cannot make it good, no more than where a Letter of Attorny is to deliver livery of ſeiſin after the death of the Feoffor; for no ſuch ſpecial appointment can controll a rule in Law to the contrary.

Tarbam's Caſe, 3 Eliz.

The

The Reader's Argument upon the Statute and Commission.

The Sea within the Realm of England.

FIrst, touching our *Mare Anglicum*, in whom the interest therein is, and by what Law the Government thereof is, is a fit question, and worth the handling. And in my Argument therein, I hope to make it manifest by many proofs and precedents of great worth and esteem, that the King hath therein these powers and properties, *videlicet*.

1. *Imperium Regale.*
2. *Potestatem legalem.*
3. *Proprietatem tam soli quam aquæ.*
4. *Possessionem & Proficuum tam Reale quam Personale.*

And all these he hath by the Common Laws of *England*: in the 6th of *Richard* the Second, *Fitz. Prot.* 46. it is said, *That the Sea is within the Legiance of the King, as of his Crown of* England; This proves that on the Seas the King hath *Dominationem & Imperium ut Rex Angliæ*, and this by the Common law of *England*. 6 R. 2.

The Charter of the Admiral of *England* hath these words in it, *Quod habeat potestatem in causis maritimis ac omnia bona waviata Flotsan Jetsan & Lagan ac omnia bona Mercimonia & catalla in mare deperdita seu extra mare projecta ac omnia & singula casualia tam in vel super mare vel littora erecas vel costeras maris quam in vel super aquas dulces portus flumina rivos aut alios locos superinundatos quoscunque inter Fluxum & refluxum maris seu aquæ ad plenitudinem à quibuscunque primis pontibus versus Mare per totum Regnum Angliæ.* Admiral's Charter.

Imprimis, This Charter is under the great Seal of *England*, *quod est Lex Angliæ*. 1.

The

2. The King grants to the Admiral thereby power in Maritime Causes, which proves the King's legal power and jurisdiction on the Seas.

3. He grants to him *bona in mare deperdita super mare emergentia & extra mare projecta*, which be profits arising on the Sea.

4. And all these are said to be *per totum Regnum Angliæ*; *Ergo*, the Seas be *infra Regnum Angliæ*.

Prerogativa Regis, c. 11. In the Eleventh Chapter *de Prerogativa Regis*, it is declared, *Quod Rex habebit wreccum Maris per totum Regnum & Balenas & Sturgiones captos in Mari vel alibi infra Regnum Angliæ*: and this was by the Common Laws before ever this Statute was made; for as the King was and is the most Excellent Creature within his Realm, so the most Excellent things which Land and Sea afford are appropriate unto him. And this Statute also proves the Sea to be *infra Regnum Angliæ*, and that the profits therein, and thereon arising belong to the King by the temporal Laws of *England*.

Sir *Henry Constable's* Case. In the Case of Sir *Henry Constable* in the Fifth *Report* of Sir *E. Cook*, it is said, That *Flotsan, Jetsan and Lagan are goods on or in the Sea, and that they belong to the King, and the King by his Charter granted them to the Admiral.*

Stat. 18 *E.* 3. 28 *H.* 8. The Statute of the 18th of *Edward* the Third; *Let the Sea be open to all Strangers*: and the Statute of 28 *H.* 8. Chap. 15. *If any Treason, Murther, or other Felony be done on the Sea-coast, the Offenders shall be tried in such County as the King shall appoint by Commission to be directed to the Admiral and others, to try the same* per Sacramentum duodecim, which is by Jury.

31 *H.* 6. And the Statute 31 *H.* 6. Chap. 4. there is a Restraint, That no Subject do attach any Stranger in amity within this Realm on the Sea.

Here the Statute-laws are in force on the Seas, as appears by the examples; but these seem to tie the Person onely.

And

And in the *Iriſh Reports* of Sir *John Davies*, in the Caſe of the Royal Piſcary of the *Banne*, it is ſaid, *That the Sea is the King's proper Inheritance.* Sir *John Davies.*

And Mr. *Bracton*, *lib.* 2. *cap.* 12. in his Title *de acquirendo rerum dominio*, ſetteth forth a preſcription in theſe words, *Quod J. S. & anteceſſores ſui fuerunt quiet' de Theolonio & aliis conſuetudinibus dandis per totum Regnum Anglie tam per terram quam per mare:* and many times in that Chapter he reiterates the ſame words; which is a ſtrong proof that the Sea is *infra Regnum Anglie*, and that the King governs there by his Common Laws of *England*; for that preſcription is a main and material point of the Common Law: And the like is alledg'd in Sir *Henry Conſtable's* Caſe by way of Cuſtome in the Citizens, as of *Briſtol*, to have *Flotſan* on the Seas between the high-water and the low-water Marks. *Bracton. l.* 2. *cap.* 12.

For the Prerogative and Intereſt that the King of *England* hath in the Seas of *England*, and the Antiquity of the Court of Admiralty; See the Record in *Co.* 4 Inſt. 142.

So I take it I have proved the King full Lord and Owner of the Seas, and that the Seas be within the Realm of *England*; and that I have alſo proved it by Ancient Books and Authorities of the Laws, and by Charters, Statutes, Cuſtoms and Preſcriptions, that the Government therein is by the Common Laws of this Realm.

One Caſe and one Statute ſeem to ſway to the contrary, and that is *Lacy's* Caſe, where one was ſtricken on the Seas, and died on the Land, that the Common Law could not try this Murther: It is true, becauſe that Trial was to be by Jury, which muſt come out of a proper County, which could not in this Caſe, becauſe the Sea was not within County-ground, and ſo no Jury could be ſummoned there. *Lacy's* Caſe.

And I acknowledge that the King ruleth on the Sea by the Laws Imperial, as by the Roll of *Oleron* and other; but that is onely in the particular Case of Shipping, and for Merchants and Mariners: But the King hath neither the property of the Sea, nor the real and personal profits there arising, but by the Common Laws of *England*, and in proof thereof the Book 15 and 16 *Eliz. in Dyer*, where the Grounds gained from the Sea pertained to the Queen;

Le Roll de Oleron.

15 & 16 *El. Dyer.*

And in Sir *John Davis* his Reports, *Piscar. de Ban.* 56. That the King shall have the Land gained out of the Sea.

Which must needs be by the Common Law of *England*; for no Law gives the King any Soil, but onely the Common Laws of *England*; so this is sufficient proof for the real profits, and for the personal profit the Charter of the Admiralty and other Cases aforesaid make it manifest.

13 *R. 2. Ass.* Admiralty.

And there is a Statute made in 13 *R.* 2. *cap.* 5. which restrains the Admiral that he do not meddle with any thing done within the Realm, but on the Seas; by which it may be collected, that the Seas be not within the Realm of *England*: But in my opinion the intent of that Statute did rather limit the Admiral how far he should extend his Jurisdiction, than any way to set forth the bounds of this Realm: wherein my conclusion herein is, That my Statute hath his extent within all the Realm of *England*; and that English Seas being within the Realm, be within the bounds of my said Statute of Sewers, and that Statute-law is in full power on the Seas, as by the Cases and Statutes mentioned formerly doth appear.

Of Islands.

De Insulis.

BEcause in my Case in matter, though not in express words there is an Island, therefore it comes now fitly in turn to declare whose the same is in ownership, and what

what Laws the same is to be governed by: And first, of the definition thereof: *Justinian in Suis Institutionibus* saith, that *Insula est locus undique circumdatus aquis*, p. 153. And with this agreeth *Britton*, in his Title of Purchase, *England* of it self is not *Insula*, because it is not *undique circumdatus aquis*. But *England* and *Scotland* be one intire Island, and the most famous in the whole World; *England*, take it *per se est peninsula*, that is *penè Insula*, almost an Island; for on all parts it joins to the Sea, but towards some parts of *Scotland*.

Definitio Insulæ. *Anglia.* *Scotia.* *Peninsula.*

Gernsey and *Jernsey* be Islands on the Sea, but it seems by the Resolutions in *Calvin's* Case, the *7th Report*, That they be not within the Realm, nor governed by these Laws, because the King hath them by his Title of *France*.

Gernsey. *Jernsey.*

The Isle of *Man* was in times past a petty Kingdom, and had a King, but he was onely as a Viceroy, and under the King of *England*, as by a Record.

Man.

Where *Artold*, King of *Man*, made suit to the King of *England* to come into *England*; but whether *Man* be within the Realm or not, seems to be put without question in Sir *Edward Cook's* Case of *Calvin*, and by *Kelway's Reports*, 11 *H.* 8. that it is not, for there an office found after the death of the Earl of *Darby* by a Writ out of the Chancery of *England* was avoided, because as the said Books do affirm *Man* was not within the Realm of *England*; but under the favour of these Books, that is no necessary cause to avoid that Office; for in my opinion the said Office of the Earl of *Darby* was void, *quia in Man breve Domini regis non Currebat*, and so in the County *Palatine* of *Chester*, *breve Domini regis non Currit*, 161. *tamen Comitatus Cestriæ est infra Regnum Angliæ*. Mr. *Cambden* in his History *de Insulis* is of opinion, that *Man* was a Member of the Realm of *England*: and therein he hath these words, That *Man* is an Island situate in the mid-way between *England* and *Ireland*. *Sed de qua utrique terrarum applicari de Jure debuerat ab antiquis non ambigebatur, demum in hunc modum lis ista quievit quoniam advectos periculi Causa venenosos hæc terra*

11 H. 8. *Kelway's R.* *Cambden.*

vermes admisit, ergo eam Britanniæ applicandum Censura Communis dictavit, by which it may appear, that the Isle of *Man* was within the Realm of *England*; or at the least a Member thereof.

Wight. But I do take the Isle of *Wight* originally to be parcel of *England*, and is a part of the County of *Hampshire*, and was as it were divorced from the Continent as was *Sicily* from *Italy*; the one, as Poets feign, was parted from the Continent or main Land by an Earthquake; the other, as is imagined, by the rage and violence of the Sea: *Insula Vectis inquit Cambdenus in suis insultis Britannicis, fol. 707. est pars Comitatus Hamtoniæ & à Continente Britanniæ avulsa est ut cohæsisse videbatur*, for many do imagine that it was torn from the main Land by the violence of Waters, as of late years parcel of the *Spurnhead* in *Yorkshire*, which before did adhere to the Continent, was torn therefrom by the Sea, and is now in the nature of an Island: Yet the same is within the Realm of *England*, and remains parcel of *Yorkshire*; and the like is said of the Island call'd *Silly*. Many other ancient Islands there be, which being in the English Seas be parcel of this Realm, which I will pass over to avoid prolixity.

Cambden, fol. 707.

Nova Insula. But in our Case a new Island is risen up in the English Seas, to whom the same in point of property and ownership shall belong, and what Laws the same shall be governed by, comes now justly to be disputed of. *Justinian* in his *Institutes, De rerum Divisione*, saith, *Quod insula in mari nata (ut Delos) est primi occupantis.* And *Britton*, one of our ancient Writers in his Book *Titulo Purchase, fol. 86.* saith, That if a new Island rise up in the Sea, *datur primo occupanti*, and agreeth fully with *Justinian* therein; but saith he, If it be taken or divorced from the Continent, then it continueth to the former Owner; but clearly our Law of *England* doth not agree with either of those Authours in the point of ownership. For, if, as I have formerly delivered it, the Sea in property, possession and profit, *tam in aqua quam in solo*, belongs to the King in the right

Justinian.

Britton 86.

of

of His Crown of *England*, as I take the Law clearly to be, then it followeth as a consequent, That the Ground which was the King's when it was covered with waters, is His also when the waters have left it; For our Law admits not any thing, either real or personal to go *primo occupanti*; but when an Owner cannot be found, the Common Law gives it *Domino Regi*, as Waifs, Strays, Wreck of the Sea, Treasure found, Escheated-lands, and such like; so that my opinion is conceived in this, that in point of ownership and property, the said new Island is the King's.

But yet I am likewise of opinion, That a new Island risen from the bottom of the Sea, although it be within the Realm, yet it is neither within County, Parish nor Town of this Realm, till the King by his Edict or Proclamation have so declared it.

There may be Islands also within the Land compassed about with fresh Rivers, as the Isle of *Axholm* in the County of *Lincoln*, and *Sheppey* in the County of *Kent*, and divers others. But Mr. *Bracton* in his Book *de acquirendo rerum dominio*, doth very well deliver the Law concerning his new Islands which arise in great Rivers; his words be these, *Habet etiam locum eadem species accessionis Insula nata in flumine quod si quidem mediam partem teneat Communis est eorum qui pro indiviso ab utraque parte fluminis prope ripam prædia possident pro modo latitudinis cujuscunque fundi que latitudo prope ripam sit que si alteri parti proximior sit, eorum est tanta qui ab ea parte prope ripam prædia possident: Si autem insula in Mari nata sit quod raro accidit occupantis sit Domini Regis non tamen credas proprium alicujus agrum in formam insulæ redact' insulam esse ut ecce flumen dividatur in superiori parte & circuit agrum alicujus & demum infra in quo casu ejus erit ager cujus prius fuerat: Cavendum quoque erit in metienda vicinitate insularum quia potest quis in hoc de facili decipi ponatur igitur punctus quod in medio inter utrumque agrum & secundum hoc si insulæ citra punctum sit vel hujus tant' vel illius tant' erit si autem sit & citra punctum & in ipso puncto & ultra tunc pro indiviso: Communis erit ut tantam*

Bracton, lib. 1. cap. 2.

tam mihi de ipso insula cedat quæ continentur in medietate pontis usque ad agrum meum. Si autem insula rotunda inveniatur hoc observetur quod omne quod propinquius est mihi cedat, & ita vicina cedat quod ei vicinius erit.

But whether the Laws of this Realm be of force in the said new-sprung-up Sea Islands, or not, is a question: It appears in *Calvin's* Case, and in the Case of the Tanistry in the *Irish Reports*, That if the King conquer an Island or Nation, the same is no part of *England*, nor the Laws of *England* there in force, till the King shall so declare the same, but the own proper Laws seem to be in force there; but if the King conquer a Nation from an Infidel, there the ancient Laws of that Nation upon the conquest are extinct; but the Law is not so of another Christian Region, as *Callis*, *Guyen*, *Bulloign* and the like. And although *Ireland* was under the obeysance of the King, yet the Laws of *England* were not there in force, till the King so declared the same.

Callis. Guyen. Bulloign. Ireland.

Wales.

And although *Wales* before the Reign of *E.* 1. was within the Fee of the King of *England*, yet was it not parcel thereof, till the Statute of 12 *E.* 1. so made it; and although that Statute so annexed *Wales* to *England*, yet being but by the word or figure *adjuncta*, the Laws of *England* were not totally in force there till the Statute 27 *H.* 8. so declared them, as is holden in *Rice Thomas's* Case in *Plo. Com.* but notwithstanding whether *Wales* be within my Statute, or not, is questionable, for these Reasons following: First, it is clear that a general Law unstinted and unbounded shall extend to *Wales* as well as to *England*; but our Law grants Commissions within the Realm of *England*, and so precisely prescribes it to bounds; and it may seem that the Parliament took it so in 1 *Mar. cap.* 11. where Commissioners of Sewers were authorized in the County of *Glamorgan*, which, as may be objected, need not, if *Wales* had been formerly comprised; and some new Statutes, as that of Alehouses in 1 *Jac. cap.* 9. and that of Rogues, 1 *Jac. cap.* 7. extend the same to the Realm of

England

England and Dominion of *Wales*, as if *Wales* should not be contained in the words, (the Realm of *England*) yet notwithstanding in my opinion this Statute of 23 *H.* 8. extends to *Wales*; for although the Statute of the first of *Mary* gave power to Commissioners in *Glamorganshire*, that was for a special purpose, which, as was conceived, the Statute of 23 *H.* 8. did not in *England* extend thereunto, that is for the carrying away of the Sand which was thrown upon their Grounds; but in that Statute it may well be perceived, that the Statute of 23 *H.* 8. was of force there; and inserting the words, *Dominion of Wales*, in the said Statute of Poor and Rogues, was rather of superabundance to satisfy some which might *nodum in scirpo quærere*, make a doubt where none was, than that they were there put for any necessity requiring the same: But I am of opinion, that in this new-sprung-up Island the Laws of *England* are there in force, because when it was Sea, the same was under the Government of these Laws; and although the nature and quality thereof be changed, *viz.* dry Land for full Sea, yet the same Laws and Government remain in force; so that I hold this new Island within the Statute, and that the property thereof is the King's.

Now occasion and time gives me fit opportunity to treat of Grounds which be newly gained from the Sea. If, as I have formerly declared, the Grounds be the King's when they be covered with Waters, it must needs be held an infallible ground, that they be also the King's when the Waters have left them dry; and when the Waters had their being on the same, the whole Profit there arising did appertain to the King; yet I have known in some Countries where the Frontagers have claimed those Grounds so left, by a pretended Custome of Frontagers, and some probable reason might be shewn, wherefore they should have the same; for as their Ground was nearest the Sea, and so next to the charge to repair the Defence, and next to the loss where any overflow happened, it might therefore seem reasonable, that as they were put to the greatest charge,

charge, and in peril of the loss of their Lands, that so if Lands were left by the Sea affront them, that these Lands might accrew unto them as a reciprocal consideration for their charge and loss; but I take it that of late the Law hath in these Cases been oftentimes ruled for the King against the Subject; for at *Croft* in the County of *Lincoln*, 1600 Acres were gained from the Sea, affront the Manor of Sir *Valentine Brown* there, yet he was put to obtain a grant from the King thereof: and one *Busbey* of St. *Keynes* claimed Grounds left by the Sea, by the said pretended Custome of Frontage, but they were decreed against him in the Court of Wards, in 12 *Jac. R.* in which Case I was of Counsel: For it were inconvenient that the Subject should have Frontage, and yet no bounds prescribed thereto; so that ten thousand Acres might be left affront a Man's Manor, which were not fit a Subject should have this large Inheritance by pretence of such allowed Custome; and I suppose I may herein say in this Case, as Mr. *Plowden* doth of his Silver Mines, That it is inconvenient a Subject should have the Silver Mines in his Grounds, for so might he become richer than the King.

So it is not fitting that a Subject should have the Grounds left by the Sea, when so much may happen to be left as the King's own Lands in the Realm come to; and so because *nimium se exaltat in prerogativam Regis*, I am of opinion the new gained Grounds from the Sea appertain to the King as a Royal Eschest, and not to the Subject; but in my Case here is a prescription where the owner of the Manor hath *Incrementum & decrementum Maris*; of what force this is, is now to be argued; therefore I will now declare what interest a Subject can or may challenge in the Sea, or Grounds gained therefrom.

Personal profits arising on the Sea, Subjects may have and challenge by custome and prescription, as to have free Piscary on the Sea; and a Parson had Tythes of Fish gotten in the Sea by the Inhabitants of his Parish; and yet the Sea, nor any part thereof is not in any Parish, but it followed the person.

In

In Sir *Henry Conſtable's* Caſe, the Citizens of *Briſtol* claimed Flotſan, (which be goods floating in the Sea) by cuſtome, in *Bracton, cap.* 12. one alledged to be diſcharged of Toll or Cuſtome on the ſeas by preſcription, in the Caſe of the Swans; in Sir *Edward Cook's* 7. *Report*, one preſcribed to have game of wild Swans at *Abbotberry*, in a Creek of the Sea, which is a member or arm of the Sea: and in Sir *Henry Conſtable's* aforeſaid, it is taken and received for Law, that a Subject's Manor may extend to the low-water mark by preſcription.

Sir *Henry Conſtable's* Caſe. *Bracton.* Caſe of Swans.

So it was reſolved and adjudged by all the Barons of the Exchequer, 16 *Car.* 1. in *Ca. ſcacc.* in a cauſe by Engliſh Bill between the King's Attorney, and Sir *Samuel Roll* and others. That the Soil whereupon the Sea flowes and reflowes, *ſcil.* between the High-water mark and Low-water mark, may be parcel of a Manor of a Subject. Roll *abr.* Prerogative *Le Roy*, 170.

Sir *Samuel Roll's* Caſe.

And ſeeing all theſe a Subject may have in and on the Seas wherefore then ſhould he not have all the grounds left by the Sea by preſcription? To that I anſwer, That he cannot have claim in any thing by preſcription and cuſtome, but that which lieth in uſe, which is the life of them both; but Lands, and Grounds which have alwaies been Sea, could not be nor lie in uſe, and therefore they cannot be claimed, nor the ſame can be bounded out by preſcription or cuſtome; yet Lands between the high-water mark and low-water mark the bounds thereof may be preſcribed to belong to, or to be parcel of the Manor, becauſe in every 12 hours, or in every day they lie dry, and ſo a Subject all that time may have uſe of them, and ſo of all the reſt of the ſaid things, but in that which never lay in uſe, no cuſtome or preſcription could take hold on, inſomuch that in my Opinion, no preſcription nor cuſtome can fetch Lands farther than the low-water mark.

BODLEIANA BIBLIOTHECA

Grounds left.

BUT now what grounds shall be said a leaving by the Sea, is a point in my Case also, for it is certain that at spring-tides the Sea useth to overflow the *Marshes* in *Lincolnshire* and *Norfolk*, and returneth within a short space again; these being usual and annual, be not accounted grounds left or gained from the Sea; so because the Marshes in *Lincolnshire* and the Sands in *Lincolnshire* be overflown every 12 hours, and then dry again, they are not accounted grounds left or gained from the Sea, because the Sea hath daily her recourse thereon: and therefore in 15 and 16 *Eliz.* in *Dyer fo.* 326 in the Case there was a quantity of ground was left by the Sea, and whether the King, or he whose grounds were adjoining should have them, was there made a question; but in that Case there is an excellent president set down, very apt for the handling of this point, put in 43 E. 3. *Contra Abbat' de Ramsey de quodam processu in Scaccario facto versus dict' Abbat' ad ostendendum quare Sexagint' acre marisci in manus dom' Regis non debent seisiri quas predict' Abbas appropriavit sibi & domui suæ sine licentia Regis super quandam presentation' virtute cujusdam generalis Commissionis de terris à Rege detentis & concelatis. Abbas respondit quod ipse tenet manerium de Brunnecest quod situatum est juxta mare et quod est ibid. quidam marisc' qui aliquando per fluxum maris minoratur & aliquando per defluxum maris augetur absq; hoc quod appropriavit sibi pront per presentation' predict' supponebatur.* And the Attorney of the King maintained the contrary, and thereupon the King and the Abbat were at an issue; so by the Case I gather these matters:

25 *Eliz. Dyer* 326.

43 E. 3.

First, That if by little the Sea sometimes decrease and leave some parcel to the Land, and some other times run over the same again, this ground belongs not to the King; for these be grounds whereto the Subject may have a property, as in the grounds of the shore, but otherwise it

is

is where great quantity of ground which had always been drowned before is left, that belongs to the King.

Alſo by this preſident the Law was taken to be, that theſe grounds left by the Sea to the Land, were in the County of *Norfolk*, whereto they did adjoin, and in my opinion within that Pariſh whereto they lay; for there was a Preſentment, which was by a Jury of *Norfolk*, and the Jury taken to try an Iſſue muſt be *de vicineto ejuſdem comitatus*: but note there, the Preſentment was by a Jury *de Corpore Comitatus*, in 22. *Lib. Aſſiſ. pl.* 93. The Caſe was, That a River of water did run between two Lordſhips, and the ſoil of one ſide, together with the River of water, did wholly belong to one of the ſaid Lordſhips, and the River by little and little did gather upon the ſoil of the other Lord, but ſo ſlowly, that if one had fixed his eye a whole day thereon together, it could not be perceived; by this petty and unperceivable increaſe, the increaſment was got to the owner of the River; but if the River by a ſudden and unuſual floud had gained haſtily a great parcel of the other Lords ground, he ſhould not thereby have loſt the ſame: and ſo of petty and unpereeivable increaſements from the Sea, the King gains no property, for *De minimis non Curat Rex*; but put the caſe the Sea overflow a field where divers mens grounds lie promiſcuouſly, and there continueth ſo long, that the ſame is accounted parcel of the Sea, and then after many years the Sea goes back and leaves the ſame, but the grounds are ſo defaced, as the bounds thereof be clean extinct and grown out of knowledge, it may be the King ſhall have thoſe grounds; yet in Hiſtories I find that *Nilus* every year ſo overflows the grounds adjoining, that their bounds are defaced thereby; yet they are able to ſet them out by the Art of *Geometry*.

Lib. 22. *Aſſ. pl.* 93.

But if the bounds can be known, in ſuch Caſe, if the Sea hath overflowed a man's Land for forty years, and then goes back, he ſhall have

his Land again, and not the King. *Mich. 7 Jac.* Roll *abr.* 168. *per Cocke & Foster*, Roll *abr.* Prerogative *Le Roy.* 168.

The Prince Count Palatine of *Chester.*

These grounds in my Case which are left by the Sea, and lie from the haven next to the shore, are as I have formerly delivered it within the County Palatine of *Chester*; and therefore whether the Prince or the King shall have them, is now my question: The Prince hath not onely *Jura Regalia*, but also *Escheta Regalia* within his said Palatinate, and so in my opinion is not onely owner of the County, but Lord of the Prerogatives there, and all Jurisdiction is to the Prince, onely a Writ of Error lieth in the King's Bench of a Judgment there, like an Appeal to *Cæsar*, then he is Lord of those Laws by which the Freehold and Inheritance of those lands be ruled, wherefore then should not these lands belong to his Grace? And first it is usual to have a Commission directed to enquire of these Lands *ut de terris concelatis*, and this inquiry shall be by Commission; if that Commission be to issue out of the County Palatine of *Chester*, then the Lands would questionless fall to the Prince, and the enquiry to be made of the Freeholders of the said County Palatine.

Barkley's Case.

The Case put in *Barkley's* Case in the *Comment.* of Mr. *Plowden*, *fo.* 129. doth force much against the princes Title; for there it is put, that the Bishop of *Durham* had Liberties and Privileges in *Terris suis inter Fluvios de Tyne & Tese*, and afterward purchased more Lands between these two Rivers, the said Liberties and Privileges shall not extend thereto; and so if one have a Warren in his Lands in *Dayle*, and he purchase other Lands there, his Warren cannot be extended upon these new purchased Lands, for saith the book, *Things or privileges confined to certain Precincts or Dominions, cannot be extended farther, though the Dominion be inLarged, and that they shall not be inlarged with the inlargement*; but the County Palatine vested in the Prince, is prescribed within no other bounds than the word County doth confine it; and therefore this falling to be within the County,

County, ſhould be properly his, and as I am informed, the Prince hath ſpecial words therefore in his Charters, if it were granted that theſe grounds could be claimed by Charters; but I am clear of Opinion, That no increaſe of the new left grounds can poſſibly become within the County of the City of *Cheſter*; for the bounds thereof cannot extend over that circle which their Charter hath confined them to: and ſo for the cauſes and reaſons formerly declared, I take it, That the ſaid Iſland is the Kings, the ground left between the haven and the ancient ſhore, belongs to the Prince as Earl of *Cheſter*; and the ſhore becauſe of the ſaid preſcription appertains to *C.* the Subject as parcel of the ſaid Manor; and ſo according to my ſaid concluſion of my Caſe, here the King hath a part, the Prince a part, and the Subject a part of the grounds left by the Sea.

My Tenets therefore be theſe:

First, that the Subject may have the grounds of the Sea to the low-water mark, and that no Cuſtome can extend the ownerſhip of a Subject farther. 1.

That a Subject cannot have the grounds to the low-water mark, but by cuſtome and preſcription, and I take it that it is very diſputable whether grounds before they be relinquiſhed by the Sea, may be gained by Charter and grant from the Crown; I ſuppoſe they may. 2.

That the words *incrementum & decrementum maris* are fully deſcribed by the ſaid Record of 43 *E.* 3. of the *Abbat* of *Ramſey*: that is, That if the decreaſe of the Sea be by little and unperceiveable means, and grown onely in long tract of time, whereby ſome addition is made to the Frontagers grounds, theſe by theſe words may appertain to the Subject; and herein the ſaid words have no other operation, but Lands left to the ſhore by great quantities, and by a ſudden occaſion and perceiveable means, accrew wholly to the King. 3.

That

4. That the increase to the said County Palatine, for the causes aforesaid, doth appertain to the Prince as Earl of *Chester*.

The Shore.

BUT now I am arrived at the continent, and the first ground I set my foot on is the shore, which in *Latine* is called *Littus Maris*, it taketh the name wholly from the Sea, as partaking most with her nature, and so *Ex digniori parte appellatur*; yet it is not all one with the Sea, nor with the Land, but participates with them both: And Mr. *Bracton* in his second Book, *Chap.* 12. saith, That *Littora Maris accessoria*, what the shore is appears by *Justinian* the Emperour in his *Institutes*, *lib.* 2. *pag.* 141. and is there thus defined, *Littus Maris est quousque maximus Hibernicus, & jus fluctus eluderet & quousque fluctus Maris in estate longius exestuat*; and with this agreeth *Cicero Topicorum*, *The shore is not counted for lands or grounds gained from the Sea, or left by it, because at every full Sea it is covered with the waters thereof.* In the 13th Chapter of *St. Matthew's* Gospel, ver. 2, 3. it is said, That our Saviour *Jesus* went into a ship, and sate there, and the whole multitude stood on the shore, and he spake unto them: Hereby it appears, that the shore was the dry land, because they stood thereon; and it was a great quantity of ground, for thereon stood a multitude, and it was near the brink of the water, because they heard *Jesus* speak unto them out of the ship. In point of property and ownership it is the King's, as Lord of the Seas; but as Sir *Henry Constable's* Case is, a Subject may have the same, as belonging to his Manor by prescription. In the Imperial Law which the Civilians use, the Sea shore is held to be common to all, and that it is as lawfull for *Diogenes* the poor Cynick, as *Crœsus* the rich King, *Casam.* 161. *Ponere & retia siccare*; but our Commonlaw of *England* doth in reason much surpass either the Imperial Law or the Civil Law, in distinguishing upon these; for it is said, *Rex in ea habet proprietatem*

Bracton.

Justinian.

Cicero.

Mat. 13. 2, 3.

sed

sed populus habet usum ibidem necessarium: so that as to the lading and unlading of Ships, and for drying of Nets there, and for other necessary businesses, the Subjects have these uses therein, but the soil and grounds thereof belong properly *dom' Regi*. And a Subject may have the same by prescription, and therefore such as hold the shore to be the extreme point both of Land and water be in a great error, for as *Justinian* saith in his *Institutes*, *Quod gemmæ & lapilli preciosi inveniuntur*, which can be taken no otherwise *sed super terram aqua relictam*: so that this shall suffice to have said concerning the Sea shore.

Sea Coasts.

THE coasts of the Sea come next in order to be treated of: *Costera maris* be words well known, but their confined definition is hard to be found out; yet certainly they contain the shore and banks, for by the Statute of 27 *El. Chap.* 24. an Act was made for the mending of the banks and Sea works on the Sea Coasts, but in the 7th. *Chap.* of *Maccabees* Coasts have a larger extent, for there *Demetrius* Son of *Seleucus* departed from *Rome*, and came to a City of the Sea Coasts, here a whole City is set on the Sea Coasts: and in *Justine* treating of *Alexander* the great, it is reported of him, that he entred into *Lycia* and *Pamphilia*, and won and conquered all the Sea Coasts: this could be taken for no less than whole Countries, for *Alexander's* great mind and huge Army, could not march on a Mole-hill, or small tract of ground. In St. *Mark. Chap.* 7. it is thus written, *That Jesus departing from the Coasts of Tire and Sidon, came to Galilee*, so that it may thereby be gathered, That these Coasts were near the Sea, for our Saviour was no sooner out of the Coasts but he was on the Sea, which shews that Sea and Coasts be *contigua Jacentia*, yet no certain definition can I find of the words *Coasts of the Sea*, but by these and such like descriptions; yet this I gather and collect thereby, that in respect of the whole World, a whole Kingdom lying next may be said to be a Sea Coast,

27 *Eliz.* 24.

Maccabees 7.

Justine.

Coaſt, and a whole County in reſpect of a Kingdom; and in my opinion the next Town and Territories thereof lying next to the Seas, be in our Law taken to be the Sea Coaſts and no other; and therefore ſome do much err which take Coaſt to be the edge of Land next the water, and ſhore to be the brinks of the water next the Land *quaſi duo oppoſita.*

And becauſe Creeks, Havens and Ports be all of them within the charge of this Law, and this Statute was materially made in defence thereof, and as they differ in appellation, ſo they vary in definition, yet they do in ſome things agree in the material; I will therefore deliver my opinion of them.

Creeks.

CReeks of the Sea is an Inlet of Sea cornered into the main Land, ſhooting with a narrow paſſage into ſome Angle of the Land, and therein ſtretching it ſelf more than ordinary into the Land, and ſo holdeth not even quarter with the Levant Sea; and ſuch Creeks or Inlets we commonly term in the Law to be Arms of the Sea: for like as the Arme of a man ſhooteth out from the Body, ſo by a metaphor the inlet or corner of the Sea let into the Land, is called an Arm of the Sea; and although it go far into the land, yet the points of Land on both ſides may well be diſcovered: and this appears in that great Arm of the Sea on *Humber*, where it runs betwixt *Lincolnſhire* and *Yorkſhire*, the points of either County may be ſeen at once, and ſeem to ſtand even over the one to the other.

Arm of the Sea.

AND an Arm of the Sea is ſaid to extend into the Land ſo far as the flow and reflow goeth: In the Patent of the Admiral of *England* I find this word *Creek* uſed; for there the King granteth to him *omnia bona mercimonia & Catalla in vel ſuper Mare littora creeas & Coſteras Maris*, but it differs

differs much both from the shore and coasts; for a shore is sometimes dry Land, and sometimes water, a Coast is always dry Land, but the Creek is always Sea and new Land: In the Statute 28 *H.* 8. *Chap.* 15. *Rastals* Piracy, *A.* It is that all felonies, *&c.* done upon the Sea, Haven or Creek, where the Admiral hath Jurisdiction, shall be tried in such County which the King shall appoint; by the Statute it is manifest that the Creek is not all one with the Sea, nor the same that a Haven is, by the Statute made in the 4 *H.* 8. *cap.* 20. *Rastal* Merchants, 5 appoints that all Merchandizes entring in or going out of the Realm of *England*, should be charged and discharged in great Ports, and not in Creeks or small arrivals; by which Statute it is apparent that a Creek is not all one that a Port is: But yet here it seems to be an Inlet of the Sea where Ships may have their arrivals, as *Fosdyke*, *Stow*, *Winefleet*, and such like; and I take it that a Bay and a Creek be all one, and that a Mere and a Fleet be also of that nature, and that all these rather vary in words than in matter.

28 *H.* 8. c. 15.

4 *H.* 4. c. 20.

Diversity between the Shore.

A Coast.

A Creek.

Creek. Bay.

Fleet and Mere.

A Port.

A Port is a harbor and safe arrival for Ships, Boats, and Ballengers of burthen, to fraught and unfraught them at, as by the said Statute of 4 *H.* 4. appeareth: In the *Irish Register*, *Fol.* 56. Ports be said to be *Ostia & Fauces Regni*; I take a port to be some special place in some great Borough, where arrival of ships be, as the Cinque Ports, which be *Dover*, *Sandwich*, *Rye*, *Romney* and *Winchelsea*, the most famous in this Realm, and these be places of great privileges: and *Boston*, *Hull*, *Lyn* and *Plymouth*, be also Ports and Port Towns, where there are special Officers and Officers belonging to them, touching Merchants and Merchandizes: And the said Statute of 4 *H.* 4. directed that Merchants should be charged and discharged at great Ports, was for that there were Officers for the King, deputed to receive His Highness's Customs and profits thereupon arising; hereupon came that Officer called

Hollingshead. Cro. p. 120.

Cambd. 244. led Portgreve, which signifieth the Governour of the Port, as Mr. Cambden noteth *page* 244. the difference between a Creek, a Haven, and a Port, be these;

Diversity between a Creek, Haven and Port.

A Creek is a corner of the Sea let into the Land farther than ordinary, and more than the Sea is, but it is no usual or accustomed place of arrival for ships; and commonly it hath neither safe harbor nor legal privilege.

A Haven is properly a safe place of harbor for ships, but may be without any privilege at all, of which kind I know some.

And a Port is not onely a safe harbor for ships of the greatest burthen, but it is also always graced with legal privileges; and this appears so by the Statute of *Magna Charta*, cap. 9. *Quod omnes Communitates & Barones de quinq; portibus & omnes alii portus habeant omnes libertates & liberas Consuetudines*, which proveth my former definition of Ports to be true.

Magna Charta, cap. 9.

After all these definitions and distinctions, I have now prepared my Case ready to receive his censure upon the last conclusion; that is, That all the said grounds were within this Statute, but no part thereof within this Commission of Sewers; and therefore it is first to be noted, That these grounds were left by the Sea since the awarding of this Commission, and the words of the Preamble of this Statute speak of grounds heretofore won; which words (*Heretofore won*) formeth to tie the Statute and Commission, both to grounds left or won before the said Statute, and not such as be won after, like to the Statute of *West.* 2. *de Donis conditionalibus quod ad dona prius facta non extenditur*, which excludeth out of that Statute all gifts made before. And the words (*Heretofore and hereafter*) are words of consequence in point of time; and wheresoever they are spoken, they come with an *Emphasis*, as if they required expressly

obser-

observance; and so is the Statute of 32 H. 8. cap. 28. of Leases, that Statute is of all Leases hereafter to be made by Tenant in tail, with such cautions and provisoes as be limited and set down in that Statute, should be good: But Leases formerly made, though all the proviso's in the said Statute were observed, were notwithstanding by reason of the said word *Hereafter* out of the relief of that Statute. 32 H. 8. c. 28.

And so in the Statute of *Wills* 32 H. 8. which had these words in it, *All persons having Lands, or which hereafter should have, might devise*; this did not make good any devises of Lands made before: but if this should pass for current, then I should not perform my word in my conclusion, which puts it all within the Statute; and this exception, if it were material, would not put it only out of the Commission, but the Statute also; yet notwithstanding though the construction made of all the said former Statutes, stand with Law, by reason of the said words (*Heretofore and hereafter*) yet in this Statute of Sewers, the same be not material, neither be the said words (*Heretofore non*) to be precisely observed, because they be placed in the Preamble of the Statute, and not in the enacting part of the Law, as in the said former Statute they were. And expositions are not tied to Titles and Preambles, which many times comes short of the parts of the Law, but to the Body and enacting part of the Statute, which is the matter and substance: And hereupon the Statute of 21 H. 8. cap. 15. of Leases recites in the Preamble thereof, *That wherein divers Leases had heretofore been made for Incomes and great Fines, and yet after the Lessors did suffer Recoveries, if at this day a Lease be made, and but without Fine or Income, yet such a Lease shall be received to falsifie the recovery had against the Lessor notwithstanding.* The Preamble of that Statute seems to remedie no Lessees, but such as made Fines and were made before that Statute, but the said words were not put in the Body or enacted part of the Statute: And so it is in our Statute; the words (*Heretofore non*) be onely put in the preamble 32 H. 8. c. 28.

preamble and not in the material part of the Law, and so the Exposition is not to be tied hereto; so notwithstanding this Exception, these grounds though gained since the Statute, are within the relief thereof.

The second cause wherefore these new grounds should not be within this Law, is, Because these Lands be increased beyond the bounds since the making of these Laws, and so it may be alledged that they cannot extend to the new inlargement: for Mr. *Plow.* in his *Com. fol.* 129. saith, *That Laws and privileges tied to a certain Place or Precinct, cannot be extended or inlarged beyond the ancient Bounds, although the Precinct be inlarged.* As the Case in 7 *H.* 6. *fol.* 32. where in a *Nativo habendo*, a Villain had remained a year and a day in *London*, which was ancient Demesn, and there was a privilege, that every Villain and Bondslave which had remained a day and a year in *London*, the Lord might not seize him; and the Villain pleaded that he had remained a year and a day there, and so took himself to be within that privilege; but because since the said liberty granted the Bounds of *London* were much increased, therefore it was there held, that the said liberty and privilege did not extend to the new inlargement. And the Case is also put in the said *Comment.* that the Bishop of *Durham* had divers liberties in his Lands lying between the two Rivers of *Tyne* and *Tese*, and after he purchased other Lands there, the said liberties did not extend to the said new purchased Lands; and the like Law is if one have a Warren in his Manor and Lands in *Dale*, after he purchase more grounds there, his Warren doth not extend unto them. And so where one had by Charter the Lands of persons forfeited for Treason, he could not have by the said ancient Charter, Lands forfeited for Treason by Tenants in Tail, because the Forfeiture of them was given by a late Statute since the Charter, but *his non obstantibus*, I am of Opinion, That this Statute I now treat on extendeth to these new gained grounds: and I take a difference between a special Law of Privileges, and Liberties which is stin-

Plowe Com. fol. 129.

7 H. 6. f. 32.

ted or bounded either by Statute, Charter or Custome, the same can by no construction be made to exceed the Bounds; but the general Law of this Kingdom, as this Law of ours is, the Extents thereof be as large as the whole Realm is, and they be not tied to stinted Limits, as particular private Charters and Customes be; and so I conclude, That in point of Extent, this Statute of 23 *H.* 8. is tied to no other Bounds than to the Kingdom of *England.*

Diversity between Grounds gained and Grounds left.

THE third matter is that which I have grounded the conclusion of my Case upon, and that is, Whether the grounds in my Case newly left by the Sea to the shore, and the Shore be such Grounds as be within this Commission; And in my Opinion they be not: And therefore to maintain my Opinion herein, I take a difference between Grounds left by the Sea, and Grounds gained from the Sea; for Grounds left are of no value, and bring forth no Fruit or encrease at all, but the uppermost part thereof are Sand, which these Laws take no hold of; for the Commission extends onely to Grounds won and made profitable for the Commonwealth of this Realm, which *Terra relicta* yields not, for no profit at all thereof ariseth, till the Sand be inned and gained; and these Laws made the Commissioners *Severi* and not *Gainers*, and therefore did extend the Commission but to the uttermost Banks and Walls, and left the Shore as Grounds possessed by the Sea, and so be put *pro indefenso* by this Law; and therefore I do make my Conclusion as followeth:

First, That the Seas, Creeks and Bays are all within this Statute in point of extent; but that they and the shores, and the relinquish'd Grounds, be all of them out of this Commission of Sewers to be dealt withall thereby. 1.

Secondly,

2. Secondly, that Ports and Havens are totally, the Waters, as well as the Walls and Banks thereof, within the Commission of Sewers.

3. Thirdly, the shore and grounds left by the Sea when they are put as in Gainage, are then and not before within the power of the Commission of Sewers.

4. Fourthly, although the Grounds left by the Sea are not in point of defence within the Commission of Sewers, yet a Wall or Bank may be thereon raised for the aid and succor of the Countrey, but not for any cause where the defence extends but to themselves. And although Grounds have been gained from the Sea in the County of *Lincoln* and elsewhere in this Realm, yet that was done at the labor of private men, and not by the Commission of Sewers, which aims at the general good, and not at private Commodities.

5

6 So that *Super totam materiam*, I am of Opinion with the conclusion of my Case, that is, That the said new Island is the King's, the grounds left to the shore pertain to C. the

7 subject; and that because they are all of them within the Realm of *England*, they are therefore within the extent of

8 this Statute: But in regard they are Grounds left onely, and not gained nor made profitable for the Commonwealth of

9 this Realm, they are not therefore within this Commission. And so I conclude my Argument as I did my Case: in

10 which, I hope, I have neither injured the Subject in his private Inheritance, nor wronged Prerogative in any point.

Finis Primæ Lecturæ.

Initium

Initium Secundæ Lecturæ.

FOrasmuch as the first day I went perambulation about the Sea, and of all which belong to her Empire and Dominion; wherein I did survey her Bounds, her Qualities and her Government: Now I do intend to go a Progress through the Land, and to take a view of the fair goodly Rivers, which make their voyage to the Sea, for these my Statute hath taken into her protection. And this second day I purpose to call a Court of *Oyer* and *Terminer*: And I do intend, with your gentle patience, to examine all the particulars there arising. And because the said Statute of 23 *H.* 8. must be my chief guide to direct my fairest passage through these uncouth ways, I will pray aid thereon; and I will now proceed to declare what business on Land this Law hath undertaken to defend, and what offences it purposeth to reform: And accordingly the said Law doth distribute it self into these particular Branches:

First, Into matters of defence this Statute maintaineth, are these following, *viz.*

1. Walls.
2. Banks.
3. Ditches.
4. Gutters.
5. Sewers.
6. Goats.
7. Calceys.
8. Bridges.

Secondly,

2. Secondly, Into matters of Offence which this Statute terms Lets, Impediments and Annoyances which are to be put down or reformed, as cause shall require;

1. Streams.
2. Mills.
3. Ponds.
4. Fishgarths.
5. Mildams.
6. Locks.
7. Hebbingwers.
8. Hecks.
9. Floudgates.
10. Other like Lets and Impediments.

I

And to the end I might fully examine this part of the Statute, which produceth these matters, I have framed a Case, which doth give occasion in this days exercise to dispute of all them.

The Case for the Second Lecture.

Second Case. A Leaseth his Manor in the County of *Lincoln*, in which be Copyholds, to *B.* a younger Son for his life, upon Condition to have it for the life of *C.* upon Condition to have it to him and the heirs of the body of his Father. A Copyhold is forfeit, the first Condition is performed, the Commissioners of Sewers in that County upon view survey, and by their discretion decree a new bank where none was before to resist the Sea, and a new River to be cut to drain the superfluous waters in *S.* and an old Sewer in *D.* to be repaired; and by Inquisition assesses *B.* the Lessee for the Manor, the Copyholder for the Copyhold Land, and the Town of *S.* and also the Parson there for his Tythes, because they lie all in the Level; the second condition is performed, *B.* enters in the Copyhold.

My conclusion is, That this new Bank, new River, and old Sewer be well decreed, but the said Sess is void *in toto & in quolibet parte.*

Points

Points at the Commonlaw.

The Points of this Case are three at the Commonlaw, and three upon the Statute; but all of them are so woven within another, that every one of them go hand in hand from the beginning to the end of the Case.

Imprimis, Whether the Duplicate Condition be good, or not? 1.

Secondly, what Estate *B.* the younger Son hath by the first Condition, and what Estate he hath got by the second? 2.

Thirdly, a Copyhold becomes forfeit to the Lord, and before the Lord take advantage of it his Estate is changed, Whether by the change of his Estate the benefit of the forfeiture be lost, or not? 3.

Points upon the Statute.

Imprimis, Whether Commissioners have power to decree a new Bank, a new Drain, and other new defences, or not? And herein the qualities and properties of Rivers, Streams and Banks, and their dependants, are to be treated of. 1.

Secondly, Whether they may decree the said new Defences by view and survey? And herein is to be handled, What Commissioners of Sewers may do by survey, and what they may do by their discretion, and what they may do by Jury. 2.

Thirdly, in what Cases Assesses and Taxes may be laid and imposed, and on what things, and in what manner they are to be imposed; and whether the Rates set upon the persons in any case be well done or not, and where the fault is if any be. 3.

Argumentum Lectoris.

Seeing it hath been the ancient order for the Reader of this place to maintain the Conclusions of his Case, I shall therefore endeaver my self to perform that order which Custome hath imposed upon me; and accordingly as I have concluded, so I take the Law to be.

And touching the first Point, it hath been challenged and drawn in question upon some Opinion delivered in the Re-

Sir Ed. Cook's 1 Report. ctor of *Cheddington's* Case in Sir *Edward Cook's* first *Report*; where it's said, *That one contingent cannot depend upon another:* But more strictly it is called to an account in the Lord *Stafford's* Case, in Sir *Edward Cook's* eighth *Report*; for there it is held, *That one possibility cannot depend upon another possibility*; and this Case is there put, *That if A. let Lands to B. for years upon Condition to have it for life, and upon Condition to have Fee, that the Fee simple can never increase by the second Condition*; but as he saith in another Case, *Amicus Plato, Amicus Socrates, sed magis amica Veritas*, his rule taken in the first Case is very general, and the Lord *Stafford's* Case admits distinctions, which in my Argument I shall apply my self unto.

Cook, Rep. 8.

And some differences I shall take in this Point in question; therefore I shall thus distinguish, That if upon performance of the first Condition, the Original Estate be determined upon which both the first and second Condition were built and grounded, the second Condition and increase thereupon is utterly void; but if the first Estate be not destroyed nor confounded upon the first Condition performed, the second Condition and Estate thereof which shall be gotten thereby, may then well grow upon the old stock. To explain this by Example, If *A.* give Land to *B.* in Fee simple, upon Condition to have the Land in Tail, upon Condition to have for life; here because the first Estate and Livery by the first Condition is not destroyed, therefore the second Condition should well stand in force. So I do make a Lease to *A.* for twenty years, upon Condition to have the Land for forty years, upon Condition to have Fee; this first Condition and second Condition may have both their full Operation: for by the performance of the first Condition, the Lease of twenty years is not destroyed, but stands on foot; and therefore the original Estate remaining unconfounded, the Fee simple may well increase by the performance of the second Condition: But if a Lease be made to *A.* for his life, upon Condition to have in Tail, upon Condition to have Fee; the second Condition

here is utterly void, because by the performance of the first Condition, *A.* had an Estate in Fee, which drowned and destroyed his Estate for life; and so because every decreasing and increasing Estate is to depend upon the first Estate which receives the Livery, which is the life of all, therefore the Second Estate can never accrew in this Case: and this is the true reason, as I take it, of the said Case put in the Lord *Stafford's* Case; for there the lease for years was destroyed by the Lease for life, which came by the first Condition, and so the Fee simple there could never accrew by the second Condition. And in answer to the said general ground taken in the Rector of *Cheddington's* Case, *That one contingent or possibility cannot depend upon another*; under favour I take it, not that I am bound thereby, neither was it the meaning of Sir *Edward Cook*, as I take it, to extend the same so largely as they are there put, because I find many Authorities of great account which are against the said general position.

Lord *Staff.* *ford's* Case.

Rector de *Cheddington's* Case.

And first in the 38 *H. 8. Br. Feoffments, pl.* 72. a Feoffment was made to the use of *A.* and his heirs, untill *J. S.* paid him Ten pounds, and then to *J. S.* and his heirs, and so to the third person; and what is this but one condition, contingent and possibility to depend upon another, for these contingents there were held good, and were built upon a sure foundation.

38 *H. 8.*

And so in *Digge's* Case in Sir *Edward Cook's* Reports, where a Feoffment is made to the use of *A.* and his heirs, with power of Revocation, and after of new Limitation of Estates; these be also contingents and possibilities depending upon others, and many such double contingents may be put.

Digge's Case.

The Case of Sir *Edward Cook* put in the end of the Rector of *Cheddington's* Case out of 12 *Lib. Ass. pl.* 5. in my opinion doth not disallow the second Condition; for there the Case is, *That A. Leased to B. upon Condition, That if A. or his heirs pay to B. Ten pounds within a certain day, that they might re-enter; and if A. nor his heirs should not pay the Ten*

12 *Lib. Ass.*

pounds within the time; Then if B. paid to A. Ten pounds at another day, that he should have Fee: Both A. and B. failed in payment, and A. entred, and being put out, brought an Assize, and nihil Cepit per breve; this doth not prove that one condition cannot depend upon another, neither can I see well what Exposition to make of so uncertain a Case, so that I take this Case to be no evidence against mine.

14 H. 8. f. 15. But in the 14 *H.* 8. *fol.* 15. there is a Case which in my opinion makes more against my double condition than any other, which is put by *Brudnel* Chief Justice; that is, If *A.* be bound in an Obligation to *B.* upon condition to infeoff *J. S.* before *Easter* ensuing, then the Obligation to be void; and if he do not infeoff him, then to pay Ten pounds at *Pentecost*, then the Obligation to be void; The Feoffment is not made before *Easter*, therefore *Brudnel* held the Obligation was forfeit, and that the second Condition was not good: But there is a (*Quære*) set upon that Case, and so it may well be, for I see it commonly done, that if a defesans be made of a Statute which is broken, and so the Statute becomes forfeit, yet a new defesans may defeat it; and so in my Opinion may the second Condition in this Case avoid the Obligation, if the first conclusion had not been in the Case.

A Conceit. I shall add this Case also as a conceit; that is, *A.* infeoffs *B.* upon condition, if *A.* go to *Lincoln* he shall have the Lands to him, and the heirs of his Body, and if he go to *Boston* he shall have it for Ten years: and he goes first to *Boston*.

I do here hold these Conditions being put promiscuously, without distinction of the times of the Conditions which shall be first performed, and which the second, that the Fee is decreased into an Estate for years, and can never increase into an Estate in tail by performing of the second Condition, because the Livery out of which it should grow was quite destroyed by the first decreaser. So that my intent appears, that one Condition may depend upon another upon the said distinction; but whether by the performance

Second Point.

of

of the first Condition in my Case there will an Estate come to *B.* or not, I meant it for a question: for *B.* had before an Estate for his own life; then is it not possible that his Estate can hereby be increased by having the Land also for the life of *C.* if it be admitted *argumenti gratia*, that *B.* shall or may have both these Estates stand in him both at one time: for if *C.* dyed first, then is *B.* never like to have any benefit thereof; And if *B.* himself should die before *C.* then also were it impossible for *B.* to make any use of this Estate for the life of *C.* unless it were in him to grant away to another, as in the Case of the Office in the 1 *H.* 7. where an Office is granted to the King, the King could not have the Office himself; and so in that point for the King to take by the grant, he could not, yet by that Book it was in him to grant over to another which might have it. And like to this is the Case where *J. S.* is Parson of the Church of *Dale*, and the Patron grants the next avoidance, this grant can he himself take no benefit by, unless he resign, yet if he die it shall come to his Executors. 1 *H.* 7. 29. *Croft's* Case.

But I take the Law to be in my Case, that *B.* shall not by the first Condition have both the Estates in him at once, that is, for his own life, and after for the life of *C.* but that the Estate of *B.* by the first Condition, shall be decreased or changed from his own life into the life of *C.* and shall be melted and newly molded by this Condition; for an Estate may as well decrease as increase by a Condition: and yet the Lord *Stafford's* principal Case was, *That Queen* Elizabeth *did grant the Manor to* Tindal *and the heirs of his body, upon Condition upon payment of Twenty Shillings to her by* Tindal, *that he should have the Reversion to him and his heirs*; and there it is holden for Law, that by the payment of Twenty Shillings, the Reversion in Fee Simple shall increase to *Tindal*, and shall not alter or drown the Estate Tail, which is an excellent Case; but alter the putting of that Case, and then it may alter the Law also, that is, I give Land to *J. S.* and the heirs of his body, upon Condition if he pay me Twenty Shillings, that he shall have the A Conceit.

said

said Lands to him and his heirs: In my conceit by the performance of this Condition, the Estate Tail, is by increase changed into a Fee Simple; in which, note the difference between *Twaddi's* Case and this, where upon payment of 20 *s.* the Reversion is granted to him and his heirs: and where the words be, *That upon payment of Twenty Shillings he shall have the Lands to him and his heirs*: In the first Case, this Fee Simple accrewing shall not alter the Estate Tail, but in the second Case, by the Fee increasing, the Estate Tail is determined and changed into a Fee Simple, *quod quere.*

Admitting the first Condition did increase the Estate of *B.* from his own life to the life of *C.* and the second condition is performed, by the which another Estate will accrew to *B.* as I take it will, because an Estate decreased, is parcel of the first Estate; than what Estate *B.* hath got by this new Limitation, is the question: And in my Opinion, he hath at the most but gotten an Estate again for his own life, and that the Limitation to the heirs of the body of his Father is utterly void, be his Father dead or alive; for if his Father be dead, his elder Brother is the heir of his body, within these words of Limitation, who cannot take the Lands by descent from *B.* his Brother, or from his Father; but as the Case is put in *Lowlesse's* Tale *Tail*, and in the 4 and 5 *Ph.* and *Mar.* in *Dyer*, *Gresswold's* Case, where Lands were given to the eldest Son, and the heirs of the body of his Father; this is a good Estate in Tail, being made to the eldest Son, because he is capable to take the Lands in both degrees.

Littleton. Estate-tail. 4 & 5 *Ph.* & *Mar.* Dyer 156.

(Although about the duration of such an Estate Tail, there hath been a question, *viz.* whether if the eldest Son die without Issue, his Brother shall inherit by force of this intail, or the Lands shall revert to the Donor. *Dyer supra. Leonard* 2. Case 29. *Rosse* and *Morrice's* Case.)

And

And in 2 *E.* 3. the Case is famous, and is known by the name of *Roberges's* Case, where Lands were given to her and to the heirs of the husband of her body begotten; and it was there held, That if her husband were then dead, and left any heir which he had by her, they might take jointly with her; for that it was not possible to take by descent from the said *Roberges*, because he which takes it must not be heir to her, but to the husband, who never held any Estate therein: And so to be short, I am of Opinion, That no Estate of inheritance be gained by *B.* by these words, *The heirs of the body of his Father.* 2 *E.* 3.

The Case upon the third Point is this, a Manor is granted to one for his life, upon condition to have it for the life of *C.* then a Copyhold is forfeit, and before the Lord seize, his Estate is altered or changed; if now he can take advantage of this forfeiture or not, wherein the altering of the Estate of one to another is of like force, as where it alters in the Partie's self, against which it may be said, *That if Tenant for life make Waste, and then be in the Reversion, grant over the Reversion, the Grantee shall not now punish this Waste.* Third Point.

And it was resolved in the Case of *Chamberlin* and *Drake*, *Mich.* 1657. that the succeeding Lord of a Manor, shall not take advantage of waste done in the time of the preceding Lord. *Siderf.* 2. 9.

And so Mr. *Perkins*, fol. 20. *If a Tenant alien in Mortmain, and then the Lord grant away his Seigniory, the Grantee shall not enter for this Mortmain:* so by *Fitz.* in his *Nat. brev.* in his *admeasurement* of *Dower*, *If a Guardian assign to a woman more dower than she ought to have, and then grant his Guardianship over, the Grantee cannot have an admeasurement of Dower against her:* and so *Bingham's* Case in Sir *Edward Cook* 2 *Rep.* where there was Tenant for life, remainder in Fee of a Tenancy holden by Knights Service, and he in remainder died, his heirs within age, and then the Lord granted away his Perkins, f. 20. *Fitz. Nat. brev.* *Bingham's Case, Cook 2 Rep.*

his Seigniory, and then Tenant for life died, by which the said heir was to have been in ward; yet because the Seigniory was granted away after the inception of the Wardship, before it was perfectly due, it was there held, that neither the grantor nor the grantee should have the same: So Lessee for life without impeachment of waste, remainder for his own life, the privilege is lost; but yet notwithstanding, I do hold that in this Case *B.* after he hath by the performance of the Condition altered his Estate which he had when the forfeiture was committed; yet shall he afterwards take advantage thereof well enough: As if there be Tenant for life, the Remainder for life to *J. S.* and the first Tenant for life commit waste or forfeiture, he in the reversion cannot punish this during the life of him in the Remainder for life, but after his death he may; also if one make a Lease for years, upon Condition to be void, and the Lessor grant away his reversion, the Grantee may enter for breach of this Condition by 11 *H.* 7. 17. and yet here the Estate in reversion is altered from one to another; and I doubt not, but if a Tenant for life, be the Remainder in Fee to another of a Manor, and a Copihold is forfeit, and then Tenant for life died, that he in Remainder may enter into this Copyhold; and yet this Estate is altered into a possession from a Remainder; and in the Case, although the Estate in *B.* be altered, yet it is by decreaser, and so thereby it is parcel of the old Estate he had before: and therefore it is like to a Case where the husband and wife were Tenants in special Tail, and they recovered by Assize, and then the husband died, and after his death without issue, the wife's Estate being altered from an Estate Tail, into an Estate of possibility of issue extinct, was again put out and disseised, and she brought a Writ of Redisseisin, which will not lie but on the first Estate, and against the first parties, and yet it was maintained, because it was parcel of her former Estate: And so in this Case, although the Estate of *B.* was altered from his own life into the life of *C.* yet I am of Opinion, That he might take advan-

Bohenham's Case in Dyer.

11 H. 7. 17.

2 H. 4. 17. & 26 H. 6. title Aid, pl. 77.

advantage of this forfeiture, because the Customary Estate is utterly void thereby.

Points upon the Statute.

I am determined before I enter into the discourse of new defences in my Case, to deliver my Opinion touching the Walls, Banks and other ancient defences, which have had their being time out of memory, and in truth be the very materials and memorials of Antiquity: And because Banks and Walls be the first named in the Commission, they shall therefore have the first place in my argument, being the most ancient and approved defences, as well against the rage of the Seas, as against the violence of fresh Waters, that either Art or Nature have produced.

Bank.

THE Bank of the Sea is the utmost border of dry Land, and is of the same materials with the grounds wherein and whereon it standeth; it is sometimes natural, and in some places artificial: Natural, as Mountains raised higher than other grounds adjoyning as it pleased the Creator, when the first huge *Chaos* was separated, divided and distributed; Artificial, when it is cast by man's hand. *Justinian* the Emperor treating of these in his *Institutes*, and his title *de rerum divisione* describeth them in this manner, *Riparum usus est publicus illæ, verò domin' ad eos pertinet qui proximior prædiis domini sunt, itaque naves ad eas appellere, funes arboribus ibi natis Religare, onus aliquod in his Reponere cuilibet liberum est*, by which authority it appeareth, that the ownership and property of the Sea Bank and Banks of great Rivers, be to them whose grounds are next thereto adjoyning, and the Trees, Grass and other things thereon growing, belong to the owner of the soil, but the use of the Banks is common to all the King's liege people, as to tie the ships and Boats to the Trees, and to tow them to and fro, and to lade and unlade their Merchandizes thereon, and for fishers to dry their Nets on. And as the owner of the soil

and proprietor of the grounds, cannot justify the digging or casting of them down, whereby the people shall be hindred of their necessary use thereof, no more can the people which have but *necessarium usum*, fell up the Trees, or mow the Grass thereon growing, neither ought they to dig ballast there, but every one, as well owner as user, *Sic uti suo ut alienum non lædat.* I cannot more aptly compare a Bank of the Sea, or of a navigable River, than to a High-way, for that the property thereof is to him whose ground is next adjoyning, and the use thereof is common to all men, and the power thereof the King hath by His Laws, *Proprietas Domino, usus populo, potestas Regi*: wherein for more clear Illustration of this matter, I put this Case, That *J. S.* doth cut the Sea Bank, or the Bank of a great River; and *J. B.* which hath occasion to pass thereby, falleth unawares into the cut, and is hurt in body or goods, the party which cottath this Bank incurreth these mulcts: For first, the owner of the soil may have his Action of Trespass, *quare solum fodit*, and he which fell therein may have his Action upon the Case against the digger of that cut, for to recover his damage for his special hurt; and the offender may also be indicted at the King's suit for the general wrong done to the King's people: And the like Law is of a High-way.

Proprietas Domino, usus populo, potestas Regi.

8 E. 4. 9.
27 H. 8. 27.
2 E. 4. 9.

A Wall doth differ in point of ownership from a Bank, first, in respect of the materials the same is made on, for a Bank is made *Ex sole & fundo quæ ex suis propriis naturis sunt eadem cum terra super quæ ædificatur*, but so is not a Wall, for it is an artificial edifice, not of the materials arising of the place where it standeth, but which be brought thither and built there, *ad propria onera & costagia partis*; so that the ownership and property of a Wall doth appertain to him who is bound to repair the same, though his ground lie not next thereto; but of a Bank the property and ownership is his whose grounds adjoin thereto: And this shall, I hope, suffice to have said of Banks and Walls, the two first defences nominated in the Commission of Sewers.

The

The letter of this Statute and Commission, seem to extend onely to Banks, Walls and other defences standing and being by the Coasts of the Sea and Marsh grounds there to adjoyning; but whether the Banks and Walls of fresh Rivers which have their courses to the Sea be within this Statute or not, hath heretofore bred some questions: but for my own part, I am clear of opinion that they be within the provision of these Laws, for there be two mischiefs recited in the Statutes; the first is, for not maintaining the Walls and Banks against the Sea, by reason whereof great hurt hath happened thereby, by the overflowing thereof: and the other, by the inundation of fresh water-courses through Land-flouds, which have done some damage to the grounds next adjoyning; and these Laws apply a remedy to both these grievances, that is, by repairing the Walls and Banks next the Sea, and by maintaining of the defences of the fresh Inland Rivers, to cause them to keep their Waters within their Chanels. And I take it there be words in the Statute that will bear this construction, *viz.* That by the rage of the Sea, flowing and reflowing, and by means of the Trenches of fresh Waters descending, and having their courses to the Sea by divers ways the Walls, Ditches, Banks, &c. be so dirupt, lacerate and broken, &c. And also in the preamble of the Statute the words there be, that by reason of the outragious flowing-surges and course of the Sea in and upon Marsh grounds, and other low places heretofore through politique wisedom won and made profitable for the great Commonwealth of this Realm, as also by occasion of Lands, Waters, and other outragious Springs, in and upon Meadows, Pastures and low-grounds adjoining to Rivers, Streams and Currents, wherein the Waters are to have their courses. And what keeps the fresh Waters within this Chanel but good and serviceable Walls and Banks, and what things doth this Law intend to be dirupt, lacerate and broken, but the Walls, Banks and other defences which pent up their Waters? and these Words extend more properly to the Walls and Banks of fresh Inland Rivers than to Sea Coasts. And I

do find some ancient Authority in the point out of the Charter of *Rumney* Marsh, *pag.* where the Words be, *ad districtionem faciend' ad reparand' Wallia & watergangia ejusdem marisci contra maris impetum inundationem aliarum aquar' dulcium*; which last words can have no other construction or interpretation, but to extend the same to the Banks and Walls of navigable, and other fresh Rivers and Watergauges of fresh Streams. And the Statute of 1 *H.* 4. *cap.* 12. makes the scruple clear wherein the words be, that the common passage of Ships and Boats in great Rivers of *England*, were oftentimes disturbed by leaving of wears, *&c.* and provided a remedy therein; so hereby it is manifest that fresh navigable Streams are within these Laws.

Rumney Marsh.

1 *H.* 4. c. 12.

Private Walls and Banks.

BUT all Banks and Walls wherein Waters be pent are not within the provision of these Laws, but onely such as belong to common and publique Rivers and Ditches, Sewers and Streams: for Walls and Banks made and erected as fences to mens private grounds, and there set or made to Ditches, Gutters and Streams, for the draining and watering of mens private grounds are not within these Laws, for these Laws take cognisance and notice of none but of such as tend to the good service of the Common-wealth, and therefore whereas in the Ports of *Holland* in the County of *Lincoln*, and in other parts of this Realm, divers private persons have for inning and safety of their Marshes and Marsh Grounds, cast great Banks for those private uses: these Banks are not within the protection and defence of these Laws to be maintained; but I am of opinion, That they may be extirped if they be letting and a hinderance to the common good of the Countrey where they be erected.

Forasmuch as I am now in hand with Walls and Banks, the defences to Rivers, Sewers, Ditches and Gutters, I therefore take it, that it will hold good correspondency here

in

in this place, to treat of them and of their dependences. A River therefore is a running Stream, pent in on either side with Walls and Banks, and beareth that name as well where the Waters flow and reflow, as where the Waters have their current one way, as is expreſſed in the Caſe of the Piſcary of the *Banne* in *Ireland*: In the Statute of 4 *H.* 7. *Chap.* 15. *Thames* is termed a River: In 34 *Lib. Aſſ. pl.* 11. and in *Plow. Com. fol.* 129. *Tyne* and *Teſe* be both named Rivers: and in 19 *H.* 7. *Cap.* 18. *Severn* is ſaid to be a River; *Trent*, *Humber*, *Boſton* Haven, *Lyn* Haven, and *Tyber*, *Orontes*, *Euphrates* and *Anſidus*, near which *Hanibal* the *Carthaginian* General ſtruck the Battel of *Canna*, be all of them in Hiſtories of great authority named Rivers.

4 *H.* 7. 15. 34 *l. Aſſ. pl.* 11. *Pl. Com.* 129. 19 *H.* 7. 18.

Renatus Choppinus in his Treatiſe *de Dominio Francia*, *Lib.* 1. *Tit.* 16. *de fluminibus*, ſaith, That *Fluminum duo ſunt genera, Regalia quadam, alia Bannalia ſive privata, Regalia dicuntur ex quibus princeps Jure patrimoniali vectigal capit, in quibus modum & tempus piſcationis conſtituit*: and Sir *John Davies* in his *Iriſh Reports* in the ſaid Caſe of *Banne*, ſaith, *That ſo far as the Sea doth flow and reflow, it is a Royal Stream, and the fiſhings therein belong to the Crown; but where the ſame doth not flow and reflow, And in all Rivers not navigable the* Tertenants *of both ſides*, de Communi Jure, *owe the River, and have the Piſcary; yet a Subject may have the free fiſhing in the Royal Streams by Cuſtome and preſcription*: And in the River of Thames *tam aqua quam ſolum pertinuit Dom' Regi*, and by Charter they were conveyed to the Lord Mayor of *London*, and Citizens of the ſame.

Choppinus.

So the Soil of all other Rivers, as high as there is flux and reflux of the Sea, is in the King; if no other claim it by Preſcription; *Siderfin* 1. 149.

Siderf. 1. 149.

In *Lib. Intr. fol.* 666. there is a preſident put in this manner, That an Action of Treſpaſs was brought *Quare le defend' piſcat' eſt in ſua ſeparali piſcaria & piſces inde, videli-*

In veteri Bk. Int. fol. 666.

cet,

cet, duos Salmones capi; the Defendant justified, and said, That he was seised of the Manor of *Dale*, which doth extend it self *usque ad medium aquæ de V. quæ ipse eadem piscaria in qua supponitur piscationem prædict' fieri ex australi parte*, and that the Plaintiff *eodem tempore quo, fuit seisitus de medietate de Dale quod se extendit usque ad medium filii aquæ predic' ex boreali parte ejusdem aquæ & quod ipse defendens & omnes quorum statum ipse habet in predic' medietate de Dale, a tempore quo non extat memoria hominum in contrario semper fuerant de predic' australi parte de predic' aqua ut de separali piscaria sua*; in which pleading it appears, That the Lords on either side the River, owe the River by several moities, and the several moities and the several parts of the fishing as incident thereto.

It may also here, as I take it, be moved for an apt question, in whom the property of running Waters was; for in *Natura Brevium, fol.* 123. there is a *quod permitt' habere liberam piscariam in aqua ipsius L.* whereby it appears, That the Plaintiff had property in those Waters; and in *Plo. Com.* 154. one granted *aquam suam in L.* and the Piscary palleth thereby, and so did the soil also in my opinion: for in 12 *H.* 7. *fol.* 4. a *precipe quod reddat* is brought *de uno acra terræ Cui aqua Coopertit*. In my conceit the Civil Law makes prettier and neater distinctions of these than our Commonlaw doth; for there it is said, That *naturali ratione quædam sunt Communia ut Aer, aqua profluens, mare & littora maris*: I concur in opinion with them, that the Air is common to all; and I hold my former definitions touching the properties of the Sea and the Sea shores: But that there should be a property fixed in running Waters, I cannot be drawn to that Opinion, for the Civil Law saith farther, *quod aqua profluens non manet in certo loco sed procul fuit extra traditionem Ejus cujus fuerunt ut ad mare tandem perveniat*; for in my opinion it should be strange that the Law of property should be fixed upon such uncertainties, as to be altered into *Meum, Tuum, Suum*, before these words can be spoken, and to be changed in every twinckling of an eye, and to be more

Nat. br. f. 123. *P. C.* 154.

12 *H.* 7. *f.* 4.

more uncertain in the proprietor, than a Camelion of his Colours. Our Commonlaw, which of all others is the moſt certain, did not ſet his property upon a Deer in Parks, Conneys or Hares in Warrens, nor on Fiſhes in running Streams; all which be more permanent than running Waters be: And therefore I am of Opinion, that taking this word *Aqua* for the bare running Water, there can be no property therein, but as the ſame is incident to the Soil, taking them two for one, it is drawn with the property thereof: and this difference is apparent by 27 *Henry* 7. afore ſaid; and Mr. *Linwood* puts a difference *inter Fluvium & flumen*; for ſaith he, *Eſt perennis decurſus aquæ ſed flumen eſt propria ipſa aqua.*

Let it not be held Queſtionable, whether Rivers of both kinds be within theſe Laws or not, though they be not put among the defences which this Statute ſpeaketh of; for that expreſly thoſe things which are termed Lets and Impediments, are commanded by this Statute to be removed out of the Rivers and Streams for hindring the Waters; and Navigation being ſo carefully provided for cannot be ſupported, unleſs Rivers Navigable be maintained: and theſe Rivers are like the veins of a man's Body, by means whereof the increaſe of the Grounds near thereunto adjoining are abundantly multiplied, and the Waters which trouble the Level are conveyed away thereby: ſo that I am clear of Opinion, that Rivers and their Chanels, Waters and Banks, are all of them fully within the defence of theſe Laws, howſoever ſome which would have no new Rivers caſt by the power of theſe Laws, would extend the words but to the repairs, and not to the River it ſelf.

Sewers.

Sewer.

A Sewer, whereupon theſe Laws took their name, hath been no great ſtranger to our Commonlaws of this Realm, being perfectly deſcribed, though not preciſely defined in our Law; ſome mincing the word, compound it of two words, *Sea* and *were*, ſaying, that *nomina ſunt conſonantia rebus*; and there is ſome coherence between the name and the nature of the thing. Authorities in Law will beſt decide
20 *H. 6. f.* 1. the queſtion, and therefore 20 *H. 6. f.* 1. an action of waſte is brought there againſt Tenant by the courteſie, for ſuffering a Sewer in part of the grounds to be unrepaired, by reaſon whereof his grounds in *L.* which the Defendant held by the courteſie of *England*, were ſurrounded; ſo that by this book it is made manifeſt, that the Sewer is a freſh Water trench compaſſed in on both ſides with a Bank, and is a
12 *H. 4. f.* 7. ſmall current or little River. And in 12 *H. 4. fol.* 7. an Action of the Caſe was brought for ſtopping of a Sewer in *Dale*, by reaſon whereof the Waters did overflow the Banks, and drown the Plaintiff's Meadow Grounds: So theſe two Caſes ſufficiently declare what a Sewer is; and *Hollingſhead* in his *Chronicle* termeth the Fleet Dike in *London* a Sewer; and I am of opinion, That it is a diminutive of a River, and by expreſs words Sewers be within theſe Laws, *& ſic eſt* in 39 *H. 6.* 31.

Gutter.

A Gutter is of a leſs ſize, and of a narrower paſſage and current than a Sewer is; and as I take it, a Gutter is the diminutive of a Sewer: and the difference between them is, That a Sewer is a common publick Stream, and a Gutter is a ſtraight private running Water; and the uſe of a Sewer is common, and of a Gutter peculiar, and by expreſs words alſo a Gutter is within theſe Laws, *& ceo eſt ſic mention* 39 *H. 6.* 31.

Ditches

Ditches.

A Ditch *Foſſa* is alſo deſcribed in our Books, as in 12 *H.* 4. 7. where an Action upon the Caſe was brought againſt the Mr. of *S. Marks* in *Briſtol*, for that he was bound by the tenure of his Land to cleanſe a Ditch there; he did neglect to doe the ſame, by means whereof the Waters therein were ſtopped, and did thereby ſurround the Plaintiff's Grounds; ſo that hereby it is apparent, That a Ditch is a kind of current of Waters in *infimo gradu*. And Mr. *Cambden* in *Sua Lincolnienſi Hiſtoria* doth there deſcribe *Foſdike* to be *Foſſa incibis quam Henricus Primus per ſeptem milliaria à Withania in Trentum perduxit ut Lincolnienſibus ad ſubvehenda neceſſaria uſui eſſet*; this Ditch is at this day a current and paſſage for Boats of ſmall burthen in Winter, but in Summer none at all, though of late great ſums of Money have been expended thereupon, *Sed tamen adhuc nihil inde boni venit*: at the beſt it is the worſt in all that Countrey, and is of ſo ſlow a current *ut non videtur currere omnino*: It ſerves in many places for a fence to divide Lordſhips, and is a great trough to ſwallow up Waters thereabouts, which otherwiſe would lie upon the Level, and of it I ſhall ſay no more, but *Spero meliora & expecto.*

12 *H.* 4. 7.

Cambden.

Other famous Ditches there be, as that in the North-eaſt part of the City of *York*, which is in a manner a ſtanding Water: And there is an old forlorn Dike on the Fen ſides in the County of *Lincoln*, called *Caredike*, more ancient than profitable, for it doth, as many other of thoſe unuſual Ditches do, run croſs to the ordinary currents of Waters in thoſe parts: For where the Seas (for example) ſtand Eaſt from the main Land, and ſo the ordinary currents run all from Weſt to Eaſt directly towards the Sea, this runs North and South, obvious and croſs to the natural current of the Waters, which is the true cauſe wherefore their currents be ſo ſlow, ſmall or none at all. There is another of them on *Newmarket* Heath *quæ admiranda Foſſa vocat'* the Devil's

Dike: and in *Wiltshire* there is a Ditch famous, called *Wansdike*, or *Mercurii Fossa*, which serves for a division of Countreys, and so be *Fossa Limitania*, and are either altogether dry Dikes, or contain commonly no more Waters than those that fall into them: None of these Ditches be within these Laws, but such of them which have a kind of current, and which in some sort partake with the Rivers.

Pools.

A Pool is a mere standing Water, without any current at all, and hath seldom or never any issue to convey away the Waters; but a Ditch hath no constant standing, nor any apparent current: A Pool is properly the Inheritance of some private, but a Fosse or Ditch is in use common. Pools be not within this Law for two causes; the one, because both in property and use they be private and peculiar: The other is, because these Laws seem to extend to grounds casually, and not continually drowned *& ad ea quæ frequentius accidunt Jura adaptantur*; yet all Pools be not excluded from the helps of these Laws: for such as adjoin to great Rivers, and lie upon the sides thereof without division, they are in a manner part of the Rivers; and of their kind are the two famous Pools called *Brayford* and *Swanpool*, both near unto the City of *Lincoln*.

Ponds.

A Pond is a standing Ditch cast by labour of man's hand in his private Grounds for his private use, to serve his house and household with necessary Waters; but a Pool is a low plat of Ground by nature, and is not cast by man's hand. I find a Pond within my Law I read on in *expressis terminis*, not as a thing defended thereby, but as a Let and Impediment: And had I not found him therein named, I should not by any Exposition have here brought it in amongst the Water Instruments; for I much marvell what

Impedi-

Impediment a Pond can be at all, unleſs by caſting of Trenches from the River to the ſame, it ſhall be a means to take thereinto ſome of the Waters of the River, and may thereby hinder Navigation; but this is far fetcht.

Streams.

STreams be not any of theſe, for all theſe have their proper peculiar Banks, Bounds and Chanels, and are put in amongſt them; but a Stream is properly a current of Waters running over the Level at random, and be not kept in with Banks or Walls, and ſo *Linwood* ſaith, that *Flumen* which is a Stream *nihil aliud eſt quam ipſa aqua.*

Conduits.

A Conduit or ought thereto belonging is not within theſe Laws in any ſort, whether it pertain to a private perſon, or to a Town or Corporation.

Springs.

SPrings I find within this Statute, but coupled with ſuch a word, that they thereby ſeem to be excluded and exiled quite from claiming any privilege of defence by theſe Laws; for the word *(Outragious)* being joined therewith, doth ſignifie the meaning of theſe Laws to take them to be hurtfull, and not helpfull; but all this cometh of the word *Outragious*, which being but a quality annexed upon accident, may upon juſt occaſion be taken away. And the word *Springs* of it ſelf is both in appellation and operation, very beneficial for the Commonwealth: for I may juſtly term them the vital Spirits of many the great and Royal Rivers of this Kingdom, as of *Thames*, *Trent*, and ſuch like: And therefore I am willing to let ſuch of them as be not outragious and hurtfull, to take up a place of defence within theſe Laws; for the *Trent* at the head is derived from Springs,

as many other Rivers be: and I give both the essence and assistance to them, and so in my opinion they are worthy the protection of these Laws: and I doubt not but the Waters issuing and gushing from the outragious Springs, may by the provident and discreet care of the Commissioners be so ordered, as the same may be applyed and employed to necessary uses.

So now I have run through, like a swift Stream, the qualities of these Rivers, Gutters, Sewers and Ditches, and of all their dependencies, and wherein they are to have aid and assistance of these Laws of Sewers, being in truth the very Materials of these Laws: yet for a little better explanation of their several natures and kinds, I shall therefore put these Cases;

1. First, If the Town of *A.* want Water by the drines of the season for the use of their Cattel, or for other houshold affairs, as for brewing, washing and such like; and in the Town of *B.* which doth adjoin thereto, there is plenty of Waters, more perhaps than is necessary for use there, the Commissioners of Sewers have no power by any of these Laws, for any of the said purposes, to make any order or decree to relieve the Town of *A.* with Waters from *B.* for this Statute makes but two uses of Rivers, Sewers and Streams, the one for draining, the other for sailing; and being for neither of these purposes, the Commissioners have no power to deal therein.

2. But if two Towns do adjoin, and in either of them there is a River Navigable, and by accident one of them is dried up, and the other aboundeth with Waters, more perhaps than there is necessary use of; I am, in that case, of Opinion, that the Commissioners of Sewers have power by the Commission to make a Law or Ordinance to relieve the River which wants Waters, out of the abundance of Waters which the other River hath, in help and supply of Navigation.

But put the case that *J. S.* keeps Boats for his own necessary uses and occasions, and for no other purpose, the Commissioners have no Warrant by their Commission to relieve *J. S.* with Waters for this his own private use, for that their power is the Republike; Yet if *J. S.* hath used with his Boats to carry and recarry for the common use of the people in general, then he is within the relief of these Laws. 3.

The new Stream and cut which was now of late made and cast by Mr. *Middleton* from *Ware* to *London*, could not have been done by the power of these Laws because it was not made for the draining or sailing, but for household affairs, and therefore special Statutes were enacted to begin, continue and perfect that work in 3, 4 *Jac. Regis*; and after the Stream was effected, these two Statutes brought the same within the power of these Laws. 4.

And now seeing my Law hath brought me in my argument and discourse among the things defended by these Laws; I shall now make a little digression from my Case, to treat of Bridges, and Calceys and Goats, the proper inventions and works of mens hands, and pertinent to this place to be treated of by the order of this Statute; and they be three material Instruments which this Statute by name hath been carefull to take order for.

Bridges.

BRidges are diversly taken in these Statutes, for some are thereby to be maintained, and other some are to be extirped or reformed as Lets and Impediments; wherein I think it not amiss for instruction, to open some other leading Statutes which have provided for them.

The first Statute of *Bridges* is in *Magna Charta*, cap. 23. *Nulla villa nec liber homo distringatur facere pontes nisi qui ab antiquo & de jure facere consueverant tempore Henrici Avi nostri.* *Magna Charta, cap. 23.*

nostr' this word (*facere*) is to be construed in the sense of *Reparare* or *Manutenere*, for other construction it cannot have. And if this Statute should be in force, I take it that it would abate much the power of the Commissioners of Sewers; for it seemeth by the Letter of it, that either no Bridges were to be repaired, but such as were made in the time of *H.* 2. and before; neither should any be bound to repair them, but such as in His time had then used, and were bound to repair them: but this Statute is neither repealed, nor must be abridged, as not to extend to Bridges made sithence; and I take it, under favour, that it stands on surrounded grounds, which this Statute hath to do with; as also for such Bridges as the Statute of 22 *H.* 8. c. 5. hath power over, which are Bridges standing on High-ways, for both these Statutes do in my Opinion oppose the said Statute of *Magna Charta*: Howsoever Sir *Edward Cook* in his Cases of the Isle of *Ely* recites the said Statute as it were in force at this day; and if so, then the exposition must be made, as I take it, that all Bridges made and erected since are out of the inhibition of that Statute, or else that Statute is totally repealed: For otherwise all Bridges builded since should not be repaired, because no Person or Town should be obliged to do them: And then were the power of Commissioners of Sewers almost altogether inhibited, touching Bridges, and their hands closed up for medling therewithall, but I take this Statute of Sewers in full strength to deal with such Bridges as come within the reach of it.

H. 2.

22 *H.* 8. 5.

Case of the Isle of *Ely.*

Bridges within the Law of Sewers, are such as lie on or near surrounded grounds, especially if they be not onely placed there for free passage, but also for strength, to defend the violence of the Waters, as many of this kind be; *viz. London* Bridge, *Rochester* Bridge, the great Bridges at *Lincoln*, *Boston* Bridge, and the like; and such as lie on Inland and high Countreys, over High-ways, as *Burton*, *Trent*, *Ware*, *Wainsford*, *Huntington* and such like, be within the said Statute of 22 *H.* 8. and I make little doubt of it, but all the said last mentioned Bridges are also within

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in the proviſion of the ſaid Laws of Sewers, for they lie and are built over ſuch Rivers as be all of them within theſe Laws.

The Statute of 22 *H.* 8. extends not to Bridges lying out of High-ways, but the Statute of Sewers doth extend to ſuch alſo: And therefore if a Bridge ſtand on a common Sewer, Ditch or Gutter which hath his current to the Sea, or to ſome River, the Commiſſioners of Sewers have power over ſuch, either to repair the ſame, or to extirp it, as juſt cauſe and occaſion ſhall require. 22 *H.* 8.

It appears by what hath been before ſaid, our Reader was of Opinion that all Ditches (except dry Dikes) Gutters, Sewers, Streams and Water-courſes, where no paſſage of Boats is uſed, nor lying by the Coaſts of the Sea or Marſh-ground, are within the ſurvey and correction of the Commiſſioners of Sewers. And he here ſaith the like of Bridges ſtanding on any Common Sewer, Ditch, or Gutter which hath its current to any River. But yet, under favour this ſeems very queſtionable, upon the words of this Statute of 23 *H.* 8. 5. which ſpeaks onely of Ditches, Gutters, Sewers and Streams by the Coaſts of the Sea, or Marſh-ground; and is expreſly contrary to the Statute of 3 *Jac. cap.* 14. whereby 'tis declared that the Walls, Ditches, Banks, Gutters, Sewers, Gates, Cawſeys, Bridges, Streams and Water-courſes, in and about the City of *London*, where no paſſage of Boats is uſed, having their fall into the River of *Thames*, where it doth uſually ebb and flow, and is uſed for free paſſage 3 *Jac.* 14.

of

of Boats to the Sea, though they were as needfull to be ſurveyed, reformed and amended from noyance of the River of *Thames*, by the Commiſſioners of Sewers, as thoſe Rivers, Streams and Water-courſes, where the Water doth uſually ebb and flow, and where more uſual paſſage of Boats hath been, yet are not under the ſurvey, correction and amendment of the Commiſſioners of Sewers, nor of any Statute of Sewers. And therefore by that Statute of 3 *Jac.* it is provided, that ſuch Walls, Ditches, *&c.* within the limits of two Miles of *London*, ſhall be ſubject to the Commiſſion of Sewers, and to all Statutes made for Sewers, and to all penalties in the ſaid Statutes contained, as if the Water therein had ebbed, flowed, and therein free paſſage with Boats, and Barges to the Sea had been heretofore uſed.

So that by the Judgment of that Parliament, neither ſuch Ditches, Gutters, Sewers, Streams, *&c.* where there is neither flux or reflux, or paſſage of Boats, though they fall into a navigable River which ebbs and flows, and is uſed for free paſſage of Boats to the Sea, nor any of their Walls or Banks, or the Bridges which ſtand on them, (other than ſuch as the ſaid Act hath provided for, *viz.* thoſe which are within two Miles of *London*) are within the ſurvey or juriſdiction of the Commiſſioners of Sewers.

Alſo private Bridges are within theſe Laws, as if *J. S.* and his Anceſtors, owners of ſuch a Houſe, have had and uſed to have a Bridge over a great or leſs River to the Church, and to his Paſture Grounds, or to his Common; this Bridge, and all other of this kind, are within this Statute of Sewers; *viz.* to be put down or reformed if they be Impediments to the Common-wealth, and alſo to be maintained, if thereby the ſame be any material defence againſt the rage and violence of the Waters, otherwiſe not, but for putting down ſuch Bridges which have been by preſcription, I hope the Commiſſioners of Sewers will be well adviſed therein, ſeeing time hath given great approbation of them, and therefore I ſhall handle this point more fully, when I come to treat of Lets and Impediments, where that part of this Statute comes moſt fit to be handled.

The Statute of 22 *H.* 8. extends to the repairing and amending of Bridges onely, but if it be fit to take an Arch away, or to add a new Arch thereto, or to erect and build a new Bridge where none was before, this is moſt fit to be done by the Commiſſioners of Sewers, whoſe power may be extended thereto.

All Bridges ſet upon Rivers by perſons without authority, may be pulled down by the Commiſſioners of Sewers, and the parties puniſhed; for no man ought of his own authority to be ſo bold with the common and High-ways or Streams, as to erect Bridges or other Engines thereon without lawfull Warrant.

Bridges in High-ways, where there is no Stream under, but onely ſome petty Land Stream at rain and wet ſeaſons, theſe be dry Bridges, and be not within this Statute of Sewers, but yet they be within the Statute of 22 *H.* 8. if they ſtand on High-ways: In 14 *Jacobi Regis* it was found by Inquiſition taken at the City of *Lincoln* in the Guild-hall there, before Sir *Thomas Grantham* Knight, and my ſelf, and other Commiſſioners of the Sewers, that the great Bridge at *Bracebridge* near the City of *Lincoln*, and ſtanding upon the River 14 *Jac.*

of *Wytham* thirty Miles from the Sea, was fallen into great decay, whereby Carts, Carriages and Men on Horſe-back could not paſs over the ſame, as in times paſt had been uſed, in defect of *Hen. Sapcots* Eſq. who ought to repair a part thereof, by reaſon of his Manor of *Bracebridge*; and of *Bartholomew Gregge*, who by reaſon of his houſe ſtanding at the Bridge foot, called the *Hermitage*, on the North ſide of the River, ought to repair another part; and of the Corporation of *Lincoln* who was to repair a part thereof; and of the Countrey of *Moreland*, who uſed to repair another part: And the ſame was decreed accordingly. But Mr. *Sapcot* without cauſe finding himſelf grieved thereat, preferred his Bill into the Exchequer Chamber againſt Sir *Thomas Grantham* and others, to be relieved therein; and did alledge, That the ſame ſtood far from the Sea, pretending thereby that the Commiſſioners of Sewers had no power to deal with the ſame: but at the hearing of the Cauſe in *Anno* 16. *Jac.* he was overruled in that and all other parts of this Bill.

A Calcey.

A Calcey or Calſway is a paſſage made by art, of Earth, Gravel, Stones and ſuch like, on or over ſome high or Common way leading through ſurrounded grounds for the ſafe paſſage of the King's liege people, and theſe Calceys have always been expreſſed in the ancient Commiſſions of the Sewers in the Regiſter, *Fitz. nat. brev.* and in the Statute of 6 *H.* 6. *cap.* 5. but not any Calceys be in theſe Laws, but ſuch as be over ſurrounded and low grounds, as that of *Barſton Bank*, *Santby Bank*, and ſuch like: but touching Calceys lying in Towns and Villages which be in the high upLandiſh Countries, this Law doth not in any ſort extend unto them, but all Calceys leading over the ſaid Bridges, and near unto them, are provided for by this Law; yet no private Calceys are to be dealt withall by the ſaid Commiſſioners.

Regiſter *F. N. B.* 6 *H.* 6.

Goats.

GOats be usual Engines erected and built with Percullesses and Doors of Timber, Stone or Brick, invented first in *Lower Germany* and after brought into *England*, and used here by imitation, and experience hath given so great approbation of them, as they are now, and that with good reason and cause inducing the same, accounted the most usefull instrument for draining the Waters out of the Land into the Sea; There is a twofold use made of them, the one when fresh Water flows and descends upon the low grounds where these Engines are always placed, and whereto all the Chanels where they stand have their currents and drains directed, the same is let out by these into some creek of the Sea; and if at some great floods the Seas break into the Lands, the salt Waters usually have their returns through these back to the Sea: Many of these Goats which are placed on High-ways, serve also for Bridges. This Goat is no such imaginary Engine as the Mills be which some rare wise men of late have invented, but this Invention is warranted by experience, the other is rejected as altogether chargeable and illusory: Yet these Engines seem to me not to be very ancient here in this Kingdom, for that I do not find them mentioned in any of the ancient Commissions granted, before this Statute did expres the same; and surely this Statute was so curious in the special repetition of such defences *in specie* as it intended to defend and maintain, that I am of Opinion, it can scarce be drawn to extend to any other: And therefore I do agree with the Opinion of Sir *Edward Coak* in his Case of the Isle of *Ely*, that an artificial Mill, and such like new invented Engines, are not to be erected by the power of these Laws, but being once erected and proved by experience to be beneficial to the publique State, they may be continued and maintained by the authority of this Statute.

New Defences.

HItherto I have proceeded onely in the handling and discourſing of the old and ancient defences which be helpfull both to Sea and Land: And therefore I am now deſirous to enter into the argument of new defences, being a matter very fit and apt to be diſputed on: And to give ſome warrant to my argument therein, I have ſo compoſed my Caſe, as both old and new be therein contained; wherein the point will be ſhortly this, Whether the new River and new Bank mentioned in my Caſe, could be ordered to be made by the power and authority of theſe Laws: And thoſe which would take a part to argue on the contrary, may alledge much matter, and many reaſons to make good their arguments; firſt, out of the words of the Law it ſelf, for thereby it ſeemeth, that this Statute can bear no ſuch expoſition by reaſon; the words thereof literally taken, ſeem to extend onely to the old and ancient defences, and not to the erecting of new: And the words thereof in this point be theſe;

For ſuch as the Walls, Banks, Ditches, &c. by the rage of the Sea, and by the freſh Waters deſcending, be ſo lacerate, diſrupt and broken, the Commiſſion therefore doth authorize the Earls of Lincoln, Rutland *and* Exeter; Robert *Lord* Willoughby *of* Grimſthrop, *Sir* William Welby, *Sir* Thomas Grantham, *and Sir* John Hatcher, *Knights, whereof three to be of the* Quorum, *to ſurvey and amend the ſaid Walls, and Banks, Ditches, &c. in all places neceſſary, and the ſame as oft as need ſhall be to make new:* Upon theſe words of the Statute, do thoſe which argue againſt the new defences infer, that the Commiſſioners have not any power to cauſe new Banks, new Walls, or other defences to be erected; and ſo take a difference between the words *novis conſtruere, & de novo conſtruere*, the firſt extending to erect new ones where none were before, and the other purporting the erecting of a new one where before an old one ſtood: and

the words which inforce this expoſition, be penned ſtrongly to that purpoſe; for firſt, they have power to repair and amend, What? ſuch Walls and Banks as were before, and the ſame to build new; which words, *The ſame*, literally taken, muſt needs extend to ſuch old fences as were before; and the conſtruction being ſo made, excludes clearly the power to make new ones where none was before: and this expoſition may be exampled in other Caſes of like quality, as in 22 *H.* 6. *fo.* 18. where it is ſaid, *That if Leſſee for years ſuffer a houſe to fall down, and before an Action of Waſte be brought againſt him, he buildeth another in the ſame place where the former ſtood, of the ſame quality and quantity, that ſhall excuſe him in the Action of Waſte:* but ſo would it not have done if he had builded the ſame in all points anſwerable in another place, for the one is renewed, the other a new one: and in the 10 *H.* 7. *fol.* 18. in the Abbot of *Thorvton's* Caſe, the words in a Leaſe were, *That the Leſſee ſhould repair a Chapel leaſed to him, and the ſame de novo conſtruere & conſtructam curare*, which words there bear the ſame ſenſe in expoſition: And the Statute of *Magna Charta cap.* 16. ſeemeth, touching Banks, to ſway the ſame way; for there the Statute is, *Quod nullæ reparia defendantur niſi illæ quæ fuerunt in defenſo tempore Henrici Regis avi noſtri & per eoſdem locos & eoſdem terminos ſicut eſſe conſueverunt tempore ſuo*; this makes much againſt erecting of new Banks, if it be in force: for if no perſon ſhould be bound to repair ſuch as were built ſince that time, then were it vain to build new ones. Sir *Edward Cook* in his Caſe of the Iſle of *Ely*, is ſtrongly of the ſame Opinion, *That no new River ſhould be made and caſt by the power of this Commiſſion*; for the caſe there is, *That the Commiſſioners of Sewers in thoſe parts made an order and decree, That a new River ſhould be cut out of the old River there called* Owſe, *through the main Land ſeven Miles unto another part of the ſaid River:* And the queſtion there was, Whether the Commiſſioners of Sewers had any ſuch power or not? and he there delivered his Opinion expreſly, That they had not? and affirms it,

22 *H.* 6.

10 *H.* 7. *f.* 18.

Magna Charta cap. 16.

Caſe of the Iſle of *Ely*.

it, *That it was dangerous and inconvenient that Commissioners of Sewers should have any such Power and Authority, for then they might thereby stop up the Havens, which are the Ports of the Realm:* And for the justifying of this Opinion therein, he alledgeth *Fitzher. Na. Brs. fo.* 225. and the *Register, fol.* 252. that in case where a new River or Stream was desired to be made, the Writ of *ad quod damnum* was to be awarded, which should first be directed to the Escheator of that County, to the end he must enquire and certifie what damage it might be if such a Cut should be made, or a new Trench cast; and so concluded directly against the making of new Rivers and Drains by the Commissioners of Sewers. And truly there is one thing more which makes strong on that side, which is, That a new River, Drain or Cut, cannot be made but through some man's private Inheritance, and to the prejudice thereof, which is a matter very considerable: So that all these things laid together, might very well move Sir *Edward Cook* to be of the said Opinion, That no such new River or Drain could be made by the Commissioners of Sewers by the power of these Laws.

Fitz. Na. Brs. fol. 225. *Regist.* 252.

Argumentum in contrarium.

The reasons and authorities put on the other part are weighty and ponderous, and require a very good answer; which I shall endeavour to give thereto: It is true, that the words of this Statute and Commission bear much with the said former exposition; So I hope to find words in this Statute also, which will tend as much the other way: And they be in the fore-part thereof, *viz.* That daily considering the great damages and losses which have happened in many and divers parts of this Realm, as well by the outrageous flowing surges and course of the Sea, in and upon marsh grounds, and other low places heretofore through politique wisedom won and made profitable for the Commonwealth of this Realm, &c. And these grounds which have been so won, could not be so kept and preserved, but by banking and new fencing in; which proves directly, that the said new Banks and new fencing might be made for the inning and keeping

The Law it self in words extends to it.

keeping of the ſaid new won grounds: And alſo the Statute of 6 *H.* 6. *cap.* 5. gave the Commiſſioners of Sewers power to repair the ancient Banks, and Walls and Fences *& eadem, & alia de novo conſtruere*; by which words the Commiſſioners which had their power from that Statute, might make new defences, as Banks, Walls and ſuch like: And ſo is the opinion of Sir *Edward Cook* delivered upon the ſaid Statute of *H.* 6. in his Caſe of the Iſle of *Ely*, which being obſerved and granted, makes ſtrongly for this part; for that the Statute of 23 *H.* 8. doth not onely confirm all former Statutes of the Sewers then in *eſſe*, but alſo gives authority to the Commiſſioners to do after the Tenor and effect of all and ſingular the Statutes and Ordinances before that time made: And although the ſaid Statute of *H.* 6. was in time then expired, yet the form and effect of it may be followed and obſerved: And to that end I take this diverſity between a Law repealed and a Law expired, for a repealed Law is made void and fruſtrate, as either unworthy or unneceſſary for ſome reſpects to be any longer continued or put in execution, and therefore was forbidden to be uſed or practiſed; but a Law expired in time, though it hath loſt his vigor and force, yet it is like a vertuous man deceaſed, his life and actions may be worthy imitation, though the date of days be at an end; but a Law repealed is like a man condemned for ſome Offence, whoſe Life and Actions are neither of them worthy Imitation, unleſs it be to doe the contrary: And the ſaid Statute of *Henry* 6. was a worthy Law, which this Statute intended not to come ſhort on, but to extend farther than the Limits of that Law did reach unto: alſo the ſaid Statute of *Henry* 6. is uſed by Sir *Edward Cook* in the pleading of *Rook's* Caſe in his 5th Report, where he could make there no other uſe of it, ſeeing it was in time expired, than onely by way of imitation.

The expired Law of *H.* 6. giveth aid to this expoſition.

Rook's Caſe.

Alſo we muſt conceive, that theſe Laws of Sewers are of great and urgent neceſſity and uſe for the good of the whole

The equity of this Law will help this expoſition.

whole Commonwealth of the Realm, and therefore the intent thereof may be extended in expoſition beyond the letter of the words; for the words be (*and the ſame to make new*) which according to the bare words in a literal conſtruction, cannot extend to new ones where none was before, but to the reedifying of the decaied old ones; but the learned Expoſitor, whoſe conſtructions be not ſo much grounded upon the letter as upon the ſenſe, may in equal juſtice extend the ſenſe to new making, as well as to renewing of defences; for Mr. *Bract. li. 1. Chap.* 3. defineth equity to be *Rerum convenientia quæ in paribus cauſis paria deſiderat jura & omnia bene coequiperat & dicitur equitas quaſi equalitas*: And if the grave and learned Judges have in private affairs introduced this equity to direct, inlarge or diminiſh the letter of the Laws in the ſenſe of conſtruction, as by many Preſidents we find in Mr. *Plow. Com.* in *Hill* and *Grange's* Caſe, *fol.* 178. and in many other authorities, *à fortiori* ſhall this Statute of 23 *H.* 8. be expounded with as much favourable equity as can be, to inlarge the letter of the Law in the ſenſe of conſtruction, becauſe it tends ſo much to the advancement of the Commonwealth, *Et qui hæret in litera hæret in cortice.* And if the makers of the Law, when this Statute was put into the frame, had been demanded, whether their meaning was to have it extended to the making of theſe new defences where either juſt occaſion or neceſſity did inforce it; they would have anſwered, That they ſo intended it; for the ſoul and life of the Law lieth in the ſenſible expoſition thereof, and not in the bare letter, as Mr. *Plow.* alſo fully demonſtrates in his *Com.* in *Eaſton* and *Stud's* Caſe.

Bracton.

Hill and *Grange's* Caſe.

And whereas it is formerly alledged, that the warineſs of the Common-law was ſuch in theſe Caſes, that it admitted not one ſuch new Trench, River or new Cut to be made, without the awarding out of the Writ of *Ad quod damn'* directed to the Eſcheator, an Officer ſworn to enquire, firſt, what damage it might be if ſuch a new cut or drain were made? and then upon his inquiſition returned, there might

might be one made, if by the inquiſition it were found convenient, elſe not to be proceeded farther in: But in anſwer thereto, being the argument ſet down in the ſaid Caſe of the Iſle of *Ely*, I am of Opinion, That there may be more wary and circumſpect proceedings by this Commiſſion, than in the *Ad quod damn'* by the Eſcheator; for there be many Commiſſioners which be all ſworn, and in the *Ad quod damn'* there is but one, the Eſcheator, *plus vident oculi quam oculus & tutius eſt rem committere pluribus, quam uni*, and in my opinion, it is much better to commit this weighty buſineſs to many Commiſſioners of great gravity, experience, learning, wiſedom and integrity, than to one Eſcheator, who may perhaps want all thoſe vertues: And farther, whereas in the ſaid Caſe of the Iſle of *Ely*, it is inferred, or rather feared, that by giving this power to the Commiſſioners of Sewers, they may thereby ſtop up the Havens of this Kingdom; that fear is needleſs, for I find, that neither by the letter nor the ſenſe of theſe Laws, any ſuch expoſition can be made, either to the ſtopping up or hindring of their currents and paſſages. But to proceed in my former diſcourſe in making new defences: I know that in the 43. 43 & 44 El. and 44 *Eliz.* a great controverſie did ariſe in the County of *Lincoln*, about the building and erecting of two new Goats at *Skirbeck* and *Langrate*, for the draining of the Waters out of South *Holland* Fens into *Boſton* Haven; which work Sir *Edward Dimock* Knight, did further what he might, by the ſtrength of himſelf and his friends; and it was oppoſed by the Countrey of *Keſteven*; and the very exception thereto taken, was, That the Commiſſioners of Sewers could not by the power of their Commiſſion make a Law for the erecting of theſe new Goats where never any ſtood there before: And that Caſe proceeded ſo far, as the ſame came in the end before the two Chief Juſtices, *Popham* and *Anderſon*, who both delivered their opinion, that the ſaid new Goats, if they were found to be profitable for the good and ſafety of the County, might be erected by the power of this Statute; but they then wiſhed and adviſed, that the

Commissioners should be wary, provident and circumspect to advise deliberately before hand, that by the opinion of experienced persons in those affairs, the said new works should in all appearance seem to be profitable to the Commonwealth, if they were effected; and that Commissioners should not in any sort make such devices at the suit, prosecution, and request of private persons for their private and peculiar good, who many times sought their own ends under pretence of the publick good. And a like great controversie did arise in 12 *Jac.* in the Counties of *Cambridge*, *Huntington* and *Northampton*, about the making of new cuts and drains in the Isle of *Ely* by the power of the Commissioners of Sewers, which being much opposed, the same came in the end to be heard before the King and Council, wherein this Order was conceived as followeth.

The King's Councils Order.

HIS Majesty's Attorny-general having according to an Order of this Board of the Thirteenth of *October* last, called unto him the King's learned Council; and taking information of such Complaints as were first exhibited unto this Board, touching sundry Suits and Vexations moved of late by certain obstinate and ill-disposed Persons, against His Majesty's Commissioners of Sewers, for the Counties of *Lincoln*, *Huntington*, *Northampton* and *Cambridge*, and their Officers and Ministers, for executing the Orders and Decrees of the Commissioners, to the manifest destruction and inundations of many large levels and parts of the said Counties: And having by their Lordships like Directions,

upon adviſed conſideration, weighed and compared the ſaid late and undue proceeding with ancient Laws of this Realm, appearing in divers notable Records in the point now queſtioned, with the continual and concurrent practice of ancient and later Times; and alſo the Opinions of the Lord *Popham*, late Chief Juſtice, delivered in writing very exactly and fully upon the ſaid Queſtions, touching the Power and Authority of the ſaid Commiſſion; and thereupon making report at large unto their Lordſhips this day in full Counſel, of the whole ſtate of the Cauſe; Foraſmuch as thereby it appeared, That theſe Inventions and Diſturbances conſiſt upon four Heads, wherein the extent of the Commiſſion was queſtioned, upon pretext and conceit of Law: Firſt, That the Commiſſioners of Sewers had not authority to cauſe new Banks, Drains or Sluces to be made where there had not been any before. Secondly, That they might not lay the Tax or Rate upon Hundreds, Towns or Inhabitants thereof in general, but upon the firſt preſentment or judgment to charge every man in particular, according to the quantity of his Land or Common. Thirdly, That they had not power ſufficient to commit to priſon Perſons refractory and diſobedient to their Orders, Warrants and Decrees. And laſtly, That Actions of Treſpaſs, Falſe impriſon-

ment, and other Proceſs at the Common-law, have been brought againſt ſome of their Officers and Miniſters for executing their Decrees and Warrants; Their Lordſhips finding in their wiſedoms, that it can neither ſtand with Law, nor with common Senſe or Reaſon, that in a Cauſe of ſo great conſequent the Law can be ſo void of providence, as to reſtrain the Commiſſioners of Sewers from making new Works to reſtrain the fury of the Waters, as well as to repair the old where neceſſity doth require it for the ſafety of the Countrey, or to cauſe a charge upon the Towns or Hundreds in general that are intereſſed in the benefit or loſs, without attending particular ſurvey or admeaſurement of Acres, when the ſervice is to have ſpeedy and ſudden execution; or that a Commiſſion of ſo high a nature, and of ſo great uſe to the Commonwealth, and evident neceſſity, and of ſo ancient juriſdiction, both before the Statute and ſince, ſhould want means of coertion for obedience to their Orders, Warrants and Decrees, when as on the performance of them, the preſervation of many thouſands of His Majeſty's Subjects Lives, Goods and Lands doth depend; It plainly appearing, That it will be a direct fruſtrating and overthrow of the Authority of the ſaid Commiſſion of Sewers, if the Commiſſioners, their Officers and Miniſters ſhould be ſub-

ject to every Suit at the pleaſure of the Delinquent in His Majeſty's Courts of the Common-law, and ſo to weary and diſcourage all men from doing their duties in that behalf: For the Reaſon aforeſaid, and for the ſupreme Reaſon above all reaſons, which is the ſalvation of the King's Land and People, Their Lordſhips did order, That the Perſons formerly committed by this Board for their contempt concerning this cauſe, ſhall ſtand committed untill they releaſe or ſufficiently diſcharge ſuch Actions, Suits and Demands as they have brought at the Common-law againſt the Commiſſioners of Sewers, or any the Miniſters or Officers of the ſaid Commiſſion; ſaving unto them nevertheleſs any Complaint or Suit for any Oppreſſion or Grievance before the Court of Sewers, or this Table, if they receive not Juſtice at the Commiſſioners hands. And their Lordſhips farther Order, That Letters from the Table ſhall be written to the Commiſſioners of Decrees of like nature, when it ſhould be found needfull, requiring, incouraging and warranting them to proceed in the execution of their ſeveral Commiſſions, according unto former practice and uſage, Any late diſturbance, oppoſition or conceit of Law whereupon the ſaid diſturbance hath been grounded notwithſtanding; with admonition nevertheleſs, That care be taken that there be

be no juſt cauſe of complaint given by any abuſe of the ſaid Commiſſion.

Examinat' per Edmunds Cleric' Conſilii.

Preſent at this Order making, were,

1. The King's Majeſty in Perſon.
2. The Archbiſhop of *Canterbury*.
3. L. Chancelour *Elſmeare*.
4. L. Treaſurer Earl of *Suffolk*.
5. L. *Steward* D. *de Lenox*.
6. L. Admiral *Howard* Earl of *Notingham*.
7. L. Chamberlain Earl of *Pembroke*.
8. E. of *Arundel*, *Howard*.
9. Viſcount *Wallingford*.
10. Viſcount *Fenton*.
11. *Andrews* Biſhop of *Ely*.
12. Lord *Wotton*.
13. Lord *Cary*.
14. Secretary *Winwood*.
15. Secretary *Lake*.
16. Sir *Foulk Grevil* Chancelour of the Exchequer.
17. Maſter of the Rolls *Ceſar*.
18. Sir *Francis Bacon* Attorney-general.

All of them of the Privy-Council.

This order is in ſome points legal, and may ſtand for a direction in matters of Law, and the other parts thereof may ſtand for a preſident of ſtate; and it thereby plainly appeareth, that the King's learned Council were of opinion, That the ſaid new works might be ordered and decreed to be done by the Commiſſioners of Sewers, and that the ſame had warrant from former preſidents.

But

But the last allegation on the contrary party is very forcible against this argument, That by the making and erecting of these new Defences, the inheritances of private persons are thereby prejudiced whereon they be built; yet as *Cato* saith, *Vix ulla Lex fieri potest quæ omnibus utilis sit sed si majori parti proficiat sufficit*; and therefore this objection I thus Answer, That these new works are not to be undertaken but upon urgent necessity in defence of the Countrey, or for the safety thereof, so that the Commonwealth be therein deeply interessed and ingaged; and things which concern the Commonweal are of greater accompt in the Law, than the interest of private persons. Cato.

And so it is 13 *H.* 8. *fol.* 16. That the Commonwealth shall be preferred before the private Estate, and for the good of the Commonwealth a private person shall receive damage, if otherwise it cannot be eschewed; as a private man's house shall be pulled down, if the next house thereto be on fire, to save the Town; and the Suburbs of a City may be pulled down in time of War, to save the City; and Bulwarks may be raised on private mens grounds for defence of the Realm: And what greater Enemy can there be than the Sea, who threatens with his merciless waves to swallow up all before it, but that the hand of the Almighty hath tied and bound him in the fetters of his eternal decree, and given policy and means to man to keep him from invading the Land by artificial works, proper for such services? Therefore in my Opinion, by the very true intent and meaning of the said Statute, and by a just, equal and reasonable construction, it should lie in the power of the Commissioners of Sewers, upon just and urgent occasions and considerations, to make Orders and Decrees for erecting and making of new Banks, new Walls, Goats, Streams, Sluces, and other necessary Defences against the overflowing of the Sea; For *Ubi nova sit maris incursio ibi novum est apponendum remedium*, with this caution, That under the pretence of the Commonweal a private man's welfare be not intended to the charge, trouble and burthen of the Countrey: And with 13 *H.* 8. Pro ch. 8. ver. 27.

this alſo, That where any man's particular intereſt and inheritance is prejudiced for the Commonwealths cauſe, by any ſuch new erected works, That that part of the Countrey be ordered to recompence the ſame which have good thereby, according as is wiſely and diſcreetly ordered by two ſeveral
27 El. c. 22. Statutes, the one made in *Anno* 27 *Eliz. Chap.* 22. *Reſtal* Havens and Rivers, is where the Commiſſioners have power to compound and agree with the Lords and owners of the grounds through which the new Cuts are to be made;
3 Jac. 14. And the other 3 *Jac. Reg. c.* 14 for bringing the new ſtream to *London*: and although theſe Statutes hold not in the general caſe of Sewers, but are applied to the ſaid particular matters therein expreſſed, yet they may ſerve as good Rules to direct our Commiſſioners to imitate upon like occaſion happening.

In the Caſe of the Inhabitants of *Outwell*, *Newton* and *Tyd*, *Hil.* 1649. in *Sup. Banc.* it was urged by *Twiſden* of Council, with the ſaid Vills, that the Commiſſioners of Sewers cannot order a new Wall to be made, notwithſtanding what *Cake* here ſaith; and *Roll* ſeemed to incline to that opinion; but yet allowed the Commiſſioners Order, becauſe it appeared that the Wall which they had ordered to be made was not wholly a new work; and ſo not within the Caſe of the Iſle of *Ely*, which was for the making of a new work totally: *Style* 192.

But it was clearly reſolved, *Paſch.* 18 *Car.* 1. *B. R.* That if an old Wall or Bank be thrown down by the violence of a Tempeſt, and that was ſtraight, the Commiſſioners of Sewers may order a new one to be made there, in the form

of

of a Horſeſhoe, or any other form: *March* 198, 199, 200.

The ſecond Point upon this Statute.

It appeareth by my Caſe, That the Commiſſioners of Sewers did decree a new Bank to be raiſed, and a new River to be caſt, and an old Sewer to be repaired upon their view, ſurvey and diſcretion. The Words of this Commiſſion upon which I framed this part of the Caſe be theſe (*videlicet*) *We have aſſigned you* Theophilus *Earl of* Lincoln, Robert *Lord* Willoughby *of* Earsby, *Sir* George Manners *Knight*, *Sir* Philip Tyrwhit, *and Sir* John Wray, *Knights and Baronets*, *Sir* William Pelham, *Sir* John Read, *Sir* Edward Aſcough, *Sir* Hammond *Knights*, Anthony Erby, *Eſq*; Quor'; *the ſaid Earl, Lord, and Sir* George Manners, *we will to be three to ſurvey the Walls, Banks, Drains, Sewers*, &c. *and the ſame to cauſe to be repaired, amended or put down as cauſe ſhall require, after your wiſedom and diſcretions, and to doe after our Statutes; as alſo to inquire by the oaths of lawfull and honeſt men of thoſe places where ſuch default be.* By the Tenor of which words I conceive, That Commiſſioners of Sewers have power by their Commiſſion to proceed three manner of ways; (*viz.*) firſt, By Survey: 2. By Jury: 3. By diſcretion; wherein it behoveth Commiſſioners of Sewers to know perfectly how to uſe and diſpoſe of their powers with due underſtanding of theſe parts of this Commiſſion and Law: And the better to prepare them herein, I ſhall take ſome pains to declare unto them what they may do by ſurvey without a Jury, and what by Jury, and what by their diſcretion, without both ſurvey and Jury.

View and Survey.

VIEW is the primary part of Survey, and Survey is much, but not altogether directed by view. It is true that View is of great uſe in the Commonlaw, and it is to

be done and performed in perſon, and ſuch Views are taken
Penlington's Caſe. in Trials of Aſſizes; yet by the 36 *H.* 8. in *Dyer fol.* 61. a very perſonal View needeth not in an Aſſize, if upon examination of the Jurors it may appear, that a competent number of them know the grounds in queſtion, in ſuch ſort as they can put the party in poſſeſſion if he recover; but in an Action of Waſte, an expreſs perſonal View is both required and requiſite, for the words of that Writ directs the Sheriff *Accedere ad locum vaſtatum*; In a word, there is a diverſity between a View and a Survey, for by the View one is to take notice onely by the eye, but to ſurvey is not onely to take notice of a thing by the eye, but alſo by uſing other ceremonies and circumſtances, as the hand to meaſure, and the foot to pace the diſtances.

And the Commiſſioners Surveyors have power to take information by examination of others: And although Judge
27 *H.* 8. 28. *Fitz.* in 27 *H.* 8. *fol.* 28. holds a Surveyor of very ſmall eſteem in his power and authority, that is, That he may hear, ſee and ſay nothing, *Oier voier & rien dire*: Yet under the favour of that Book, I take a Surveyor to be of
4 *Ed.* 1. more eſteem and authority; for by an old Statute made in 4 *Ed.* 1. *Raſtal* Surveyors, firſt, he is there deſcribed to be a man which is to view the work, and to make inquiry, and to ſet down which be Copiholds, which be Freeholds, *&c.* whereby it appeareth, that a Surveyor is an actor, and not a looker on, as Mr. *Fitzherbert* would have him; ſo by theſe deſcriptions the Commiſſioners may inform themſelves what is meant by the word *Survey*, put in the Statute: And many of our Statutes take notice of ſuch an Officer as a Surveyor; For in the Statute of Bridges and High-ways, there be ſuch Officers appointed; and in the Statute made for the erection of the Court of Wards and Liveries, there is a grave Officer appointed, who is called the Surveyor general of that Court, and he is a Judge in matters there handled.

And there is alſo an Officer in this Statute of Sewers, called a Surveyor, who hath no judicial power, but is meerly an Officer.

What things Officers of Sewers may doe by Survey onely.

EVery thing which Commiſſioners of Sewers are to do, muſt be by the true underſtanding of their authorities; and this muſt be ſo done, that they make ſuch diſtinctions, differences and applications as may ſtand with knowledge, skill and learning; or otherwiſe their proceedings will prove irregular: And therefore it is not onely meet to deſcribe the Officer Surveyor as formerly I have done, but alſo his Office, which I now mean to do.

First, Commiſſioners of Sewers may view the Defences, and thereby may inform themſelves which ſtands in need of repairing and amending, and which not; and wherein the defaults and defects appear to be, and what they be. 1.

Secondly, they may by Survey take notice and knowledge, by conference with Carpenters, Maſons, Smiths and other Officers, what things are fitting to be provided for effecting the works, and what ſums of money will be ſpent for the finiſhing thereof. 2.

Thirdly, the Commiſſioners may by view and ſurvey, take knowledge of the lets, impediments and annoiances in the Banks, Walls, Rivers, Streams, Gutters, Sewers, and of the height and lowneſs of the ſaid Banks and Walls; and may thereby diſcover and find out the wants, imperfections, weakneſs and ſtrength of them, and ſo may cauſe the lets and impediments to be removed, and the wants to be ſupplied, and the weak places ſtrengthned, as cauſe ſhall require. 3.

Fourthly, alſo by Survey onely they may ſufficiently inform themſelves of the incroachment, and of the ſtraitneſs, depth, wideneſs and ſhallowneſs of the Rivers, Streams, Gutters and Sewers, and may view the defects in theſe kinds. 4.

Theſe things I have produced, as proper to be performed by view and ſurvey of the Commiſſioners.

And by *Herne's* opinion in his Reading, *p.* 3. a Man that is blind cannot be a Commissioner of Sewers, because he cannot view or survey.

And now I shall proceed to the rest.

Things to be done by a Jury.

1. FIrst, what person or persons did erect and set up any let and impediments, as a Floud-gate, Mill-dam or such like, must be found by Jury; for here the words of the Statute are to be observed, which are these, *And also to inquire by the oaths of good and lawfull men of the said shire or shires, place or places, where such defaults or annoyances be, as well within liberties as without, by whom the truth may rather be known through whose default the said hurts and damages have happened, or who hath, or holdeth any Lands or Tenements, or Common of pasture, or profit of fishing, or hath or may have any hurt, loss or disadvantage by any manner of means in the said places, as well near to the said Dangers, Lets and Impediments, as inhabiting or dwelling thereabouts, by the said Walls, Ditches, &c.* So that the first Article is full within the words of this Statute; and therefore it must be done by Jury, and no other accusation is of sufficient strength in the Law to put a man to his answer. And herein the makers of these Laws did sagely, for how should Commissioners of Sewers take notice by view or survey of such things as are done or committed in their absence?

2. Secondly, if any Wall, Bank, River, Sewer, or other defence be defective by neglect or sufferance of such as should repair the same, the Commissioners of Sewers are to inquire by Jury in whose default the same happened.

3. Thirdly, the Commissioners are to enquire, What person or persons ought or be bound by Custome, Prescription, Tenure, Covenant or otherwise; or for or by reason of what Lands or Grounds he or they be tyed or bound to do the repairs, and where those Grounds do lie, and who be the owners thereof?

And

And if a Jury find before the Commiſſioners of Sewers, that one ought to repair a Bank, *&c.* which is decayed by the Sea, *&c.* and it be removed into the *King's Bench.* The Juſtices there will not quaſh the Inquiſition, or grant a new Trial, unleſs the Perſon who was found guilty will firſt repair the Bank, of which he ſhall be reimburſed, if he be acquitted; And becauſe the Lord *Dunbarr* refuſed ſo to doe, the Court of *King's Bench* granted a *Procedendo*, *Siderfin* 1. 78. And this ſtands with great reaſon, becauſe of the damage which may happen, if the repair ſhould be deferred, untill it were determined who ought to doe it.

Fourthly, alſo it muſt be inquired by Jury, What Grounds lie within the hurt or danger of Waters, either within the ſurrounder by the Sea, or the inundation of the freſh Waters, and to whom they do belong? 4.

Fifthly, and if a new Sluce, Goat or other defence is to be erected, built and made, or a new Sewer, Gutter or Trench to be caſt, this may be determined of by the view and ſurvey of the Commiſſioners, and ſo may the aptneſs of the places where they are to be ſet or caſt, and the length, height, breadth and depth of them; for theſe things are proper for a view and ſurvey: But what perſons hold Lands and Tenements within the Level, which are fit to be chargeable thereunto, and the quantity of their Lands are to be inquired of by Jury. And theſe few cauſes I have put for example ſake: and if any other fall out within the like reaſon, then they are to receive the ſame conſtruction. 5.

Sixthly, in every caſe where an Amerciament is to be impoſed, it muſt be by preſentment of good and lawfull men upon. 6.

upon their Oaths; *Et hoc per ſtatutum de Magna Charta, c.14. nulla miſerecord' ponatur niſi per Sacramentum proborum & legalium hominum de vicineto, &c.*

Upon a preſentment made by a Jury to the Commiſſioners of Sewers, an Order was made by them to reimburſe the Dyke Reeves for money expended in repairing a Sea-wall, by laying a Tax upon divers Towns; which preſentment, order, and the proceedings thereupon being removed by *Certiorari*, *Mich.* 1649. Exception was taken thereunto for that 1. It did not appear that the Breach was within the Hundreds whence the Jury came, and ſo they had no authority to enquire. 2. The Jury had onely power to enquire of things within the Hundred of *Wiſbitch*, and it did not appear that *Newton* and *Tyd*, two of the Vills taxed, were within that Hundred; and ſo the Commiſſioners had exceeded their authority; and the preſentment was quaſhed: *Style* 185, 191, 192.

The preſentments at a Court of Sewers muſt be by the oaths of twelve men; and therefore is upon a *Certiorari* directed to the Commiſſioners of Sewers, they return a preſentment to be *per ſacramentum Juratorum* generally, without ſaying, twelve men, it is not good, becauſe that for any thing appears to the contrary, it might be by two or three onely, where it ought to be by twelve, *March* 198.

Surveyors

Surveyors preſentment.

BUT it hath been uſed, that Surveyors of the Sewers have made preſentments of defaults of things governed by theſe Laws; but whether ſuch a preſentment be binding or not, is a good point. It is clear in my Opinion, that they can make no preſentment, but ſuch as happeneth within their view and ſurvey, and what thoſe things be they formerly appeared. They cannot preſent that *J. S.* is bound by preſcription, cuſtome, covenant or otherwiſe, to repair ſuch a Wall, Bank or Sewer, for this is not within their Office. In *Kelloways Rep. f.* 141. there is a cuſtome alledged, that two men within the provoſt might preſent the Articles of the Leet; But I doubt of ſuch Preſentment, though it have a cuſtome to ſtrengthen it: I take this difference, that an original preſentment Surveyors cannot make, as to preſent *J. S.* that by the tenure of his Lands he ought to repair ſuch a Bridge, Wall, Bank or other Defence; But the Surveyors may make a ſupplemental preſentment; as for example, if it hath been preſented before by a Jury, that *J. S.* ought to have repaired ſuch a Ditch, and hath not done the ſame, and day is given him by the Commiſſioners of Sewers to doe the ſame, if the ſame be not repaired at the day, the Surveyor may preſent in this caſe the not repairing, becauſe this is but an Oath of aſſiſtence, *ad informandum conſcientiam Judicis*, for the amerciament ſhall be impoſed by the force of the ſaid former preſentment; and this latter preſentment by the Surveyors, is onely to give the Juſtices notice of the Parties farther neglect, to the end they may impoſe the greater amerciament: And a preſentment by Surveyors is not traverſable, being of ſo ſmall eſteem in Law, as our Law will not vouchſafe to take an iſſue upon it, for their act herein is not in the ordinary legal form. *Kellowg's Rep. f.* 141.

What

What Commissioners of Sewers may doe by discretion.

Discretion is the herb of grace that I could wish every Commissioner of Sewers well stored withall, for the makers of this Statute had an intention to make it of great use, being literally nominated nine or ten times in this Law, and for this cause I have inserted in my Case; but note, that the word *Wisedom* is coupled with it, and the word (*Good*) is annexed to them both, as best shewing of what pure Metal they should be made of, *After your good Wisedom and Discretion.*

There be three several degrees of Discretion, *Discretio generalis*, *Discretio legalis*, *Discretio specialis*.

1. *Discretio generalis* is required of every one in every thing that he is to doe or attempt.

2. *Legalis discretio* is that which Sir *Edward Cook* meaneth and setteth forth in *Rooks* and *Keighly's* Cases, *Hoc est scire per legem quod sit justum*; and this is meerly to administer Justice according to the prescribed rules of the Law; and herein is this discretion limited, that it go not beyond or besides those Laws which are to be executed: And this discretion is to be governed by the Laws, for *Cicero* saith, *Sapientis est judicis cogitare tantum sibi esse permissum quantum sit Commissum aut creditum.* *Cicero.*

And according to this discretion the Commissioners of Sewers ought to proceed, as was resolved in the Case of *Hetley versus* Sir *John Boyer*, *Bulstr.* 2. 197, 198. *Cro. Hil.* 11 *Jac.* 336.

3. The third Discretion is where the Laws have given no certain rule to be directed by in a Case within the power of this Commission, there the Commissioners are to order these affairs with such Wisedom and judgment, that although their censure be not framed in a Rule of Law, yet they

they are to do therein *secundum æquum & bonum*; and herein discretion is the absolute Judge of the Cause, and gives the Rule: But in the case of Legal Discretion, there discretion is but a servant, and is tied to attend upon the Law; and there the Law directs the censure, and Discretion is but to doe the same wisely and temporately; for *ipsæ* Cau. *etenim leges cupiunt ut jure regantur.* Sir *Ed. Cook* in *Rook's* Rook's Case. Case 5 *Report*, gives this Rule to the Commissioners, *That although the words of the Commission be, That they should do according to their Discretions, yet their proceedings ought to be limited and bounded within the Rules of Law and Reason; for that Discretion is a Science to discern betwixt falsity and truth, between right and wrong, between shadows and substance, betwixt equity and colourable glosses, and the Commissioners ought not to follow their wills and private affections*; for that *talis descretio discretionem confundit*: And therefore now I will declare in few words, in what things these Commissioners are to be ruled by good Discretion.

First, the quantity of Fines be left to the discretion of the Commissioners. 1.

Item, Imprisonment of the Bodies of the Offenders when they deserve, and the time how long, lieth much in their discretion. 2.

Item, It lieth in their grave Wisedoms and Discretions, when and where to erect new Walls, Banks and other Defences, and what sums of Money to raise and levy therefore. 3.

The election of Officers lieth in their discretion. 4.

It lieth many times in their discretion whom to fine, and whom to imprison. 5.

I take it this word *Discretion* used in the Statute, giveth power to the Commissioners to order businesses there arising in course of equity, for *hoc nihil aliud est*, but to proceed *secundum æquum & bonum.* 6.

I have put these few Cases as examples to direct and instruct what may be done by Discretion, omitting many other, because I had rather trust to the worst certain Law,

than to give too much way to the uncertain discretion of
Aristotle Rh. the Commissioners, according to the old saying, *Quoad fieri possit quàm plurima legibus ipsis definiantur quam paucissima vero judicis arbitrio relinquantur*; and herein I suppose I have made good my words in this, that I have proved by my Argument, That the said new Bank and new River might well be decreed by the view and survey of the Commissioners, and by their good discretion, and so might the said old Sewer be repaired; and therefore these being ended I will now proceed to the handling of the rest remaining.

My former labour hath been to expound and declare what defences, as well against the overflowing of the Sea, as against the inundation of fresh Waters, were and be to be maintained, and also new erected by the Tenor and power of these Laws: So that now it comes very aptly to be handled, for what causes, considerations and matters one shall or may be tied to the repairing and keeping thereof; which I take to be these nine several ways.

1. By Frontage. 2. By Ownership. 3. By Prescription. 4. By Custome. 5. By Tenure. 6. By Covenant. 7. *Per usum rei.* 8. A Township. 9. By these Laws of Sewers.

I suppose I shall produce sufficient Warrant and Authorities for to maintain all these distinctions, wherein I am desirous that Commissioners of Sewers, for whose learning and instruction I have taken these pains, would apply themselves to doe their duties and service herein carefully and advisedly and like to skilfull Physicians, would apply fitting Medicines to the curing of every Disease, else shall they oftentimes *Opprimere insontes & absolvere reos*: But if they will seriously cast their eyes upon these insuing Cases, they will be very helpfull to them in their proceedings.

Frontage.

Frontage.

FRontage is where the Grounds of any Man do join with the brow or front thereof to the Sea, or to great or royal Streams; and in case of the Sea or royal River, the property of the Banks and Grounds adjoining are and belong to the Subject, whose Lands do but and bound thereon, but the soil of the Sea and royal Rivers do appertain to the King, as formerly in my Tractate of Rivers may appear. But in case of petty and mean Rivers and Streams, the soil of them, as well as the Banks thereof, do appertain to them whose Grounds adjoin thereto; so that Frontage and Ownership in base inferior Rivers do not differ, but in great Streams and the Sea they do vary as aforesaid: And in 37 *lib. Assiz. plac.* 10. it seems that the Frontagers are bound to the repairs; and in 8 *H.* 7. he whose Grounds are next adjoining to a Highway, is bound to repair the same. And by these cases there is no difference touching repairs of the High-streams and the High-ways in my opinion. 37 *Assiz.* pl. 10. 8 *H.* 7.

Ownership.

THE Ownership of a Bank, Wall or other Defence is a sufficient warrant to impose the charge of the repairs thereof upon him, without being tied thereto by prescription, as appears in 8 *H.* 7. *fol.* 5. and it stands with reason, that every man should be bound to repair his own; and the consideration is also moving, for that his Grounds which lie neareſt the Waters are sooneſt subject to drowning, and if any increase be upon the small Rivers it falls to his share. 8 *H.* 7.

Preſcription and Cuſtome.

PReſcription and Cuſtome are much of one quality, for in both of them the efficient matter is (uſe to repair) and the Law hath taken notice of them in many of our Books: Preſcription doth not bind or tie one to the repair of any thing, unleſs it be *ratione terræ*.

And neither in that caſe, barely in reſpect of the Land, but of the Eſtate which the Party hath in the Land; And therefore it hath been adjudged, that a preſcription that every Occupier, *&c.* uſed to repair a Defence is naught, for 'tis too general, and would extend to Tenants at will, ſufferance, diſſeiſors, *&c.* but it ought be, He and all thoſe whoſe Eſtate, *&c.* *Cro. Jac.* 445. *Audly verſus Fawkener.*

And in this it doth differ from Cuſtome: for if it be preſented that *A. B.* and his Anceſtors have time out of memory uſed to repair ſuch a Bank, Wall or other Defence, this preſentment is void, and doth not bind the party *prout conſtat* in 21 *E.* 4. 38. 7 *H.* 4. 31. 19 *H.* 7. *Kelwey, fol.* 52. and 45 *E.* 3. But Bodies politique or corporate may be by Cuſtome bound to repair, without making mention in the Preſentment or Indictment that they are to do the ſame *ratione talis Meſſuagii terræ aut tenementi*; And to that purpoſe be the Books of 21 *E.* 4. 38 *and* 44 *Ed.* 3. *Fitzherb.* Title *Bar. plac.* 103. for there a Prior was preſented, that he and his Predeceſſors had uſed time out of memory to repair ſuch a Bridge, which was in decay, and this preſentment, though it charged no Land, was good: And in 19 *Hen.* 7. aforeſaid, it is ſaid, that one might be bound to repair a Bank or Wall *ratione Reſiantiæ*, but this could not be otherwiſe taken but that he was charged to doe the

21 *Ed.* 4.
7 *H.* 4.
19 *H.* 7.
45 *Ed.* 3.
21 *E.* 4.
44 *E.* 3.
19 *H.* 7.

ſame

same for the House he dwelt in, for *Residentia* imports so much.

Also if a man and his Ancestors have voluntarily made a defence for a long season, this will not bind his Heir thereto, though he have assets descended to him in Fee simple, for descending charges will not bind the Heirs, unless he descending have assets, as an equal consideration to bind him thereto; neither will descending assets of Land bind an Heir in this case, unless the Land it self be really tied and charged.

Tenure.

A Man by the Tenure of his Land may be bound to repair a Wall, Bank or other Defence mentioned in this Law, and in proof thereof the Book Case of 11 *H.* 7. *f.* 12. is full in the point; where it is said, *That if before the Statute of Westminster the Third, a man had made a Feoffment in Fee; or if since that Statute one had made a Gift in Tail, to hold the same by repairing a Bridge, the said Feoffee and Donee and his heirs should have been bound by the said Tenure to repair the said Bridges*; and with this agree the Books of 12 *H.* 7. 18. and 24 *H. 8. Case fol.* 9. and in *Porter's* Case in Sir *Edward Cook's* 6th Report, it is said, *That if Lands were given to repair Ways, Bridges, Causeys or such like, this doth bind the Owners of those Lands to do those repairs in perpetuity:* And in the Case of 12 *H.* 4. *fol.* 7. the Prior of St. *Mark* in *Bristol* was obliged and bound by the Tenure of his Land to repair a common Sewer: and this enough to satisfie this point.

11 *H.* 7.

12 *H.* 7.

24 *H.* 8.

Porter's Case.

12 *H.* 4.

Covenant.

So likewise a man may be bound by his Covenant to repair a Wall, Bank, Sewer or other such like matters, and he may bind himself and his Heirs to do the same; but yet this Covenant will not bind his Heirs after his death, unless there be left assets in Fee simple to descend to the said Heir

28 & 29 *H.* 8. *Dyer, fol.* 33.

Heir from the ſaid Anceſtor which made the Covenant.

Wherein I take this difference between a Covenant to bind an Heir, and a Preſcription; for by Covenant the Heir ſhall be bound to the repairs, if he have aſſets deſcended to him from that Anceſtor; but the Heir ſhall not be bound by Preſcription to repair, though he have aſſets deſcended from his Anceſtor who repaired the ſaid Defences: But if Land be charged therewithall by Tenure or otherwiſe, as a charge impoſ'd upon Land by preſcription, then the ſaid Lands are therewithall chargeable *in cujuscunque manus devenerint, quod nota.*

Leſſee for years of Lands within a Levell, ſubject to be drown'd by the Sea, covenants with his Leſſor to pay all Aſſeſments, Charges and Taxes, towards or concerning the reparation of the premiſſes: A Wall which was in defence of this Levell, and built ſtraight, was thrown down by a ſudden and inevitable Tempeſt: By order of the Commiſſioners of Sewers, a new Wall was built in the form of a Horſhoe; and the Commiſſioners taxed every man within the Levell, and among others a Leſſee for years, whom they alſo truſted with the collection of all the money: Leſſee for years dies, the leaſe being within a ſhort time of expiration; His Executor enters into the Land, and the Commiſſioners charge him with the whole, and the years immediately after expire: And it was reſolved that the Covenant doth bind the Leſſee, and that the Commiſſioners may take notice of it, and tax the Leſſee totally for his Land, without

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out laying any thing upon him in the reversion; for the Covenant doth extend to this new Wall, and the making of it in the form of a Horshoe, is not material, seeing it was adjoining to the Land: and although the new Wall be not parcel of the Premisses, as it was at the time of entring into the Covenant, because the Wall then in *esse*, and to which the Covenant did extend, was a straight Wall, yet according to the words of the Covenant the Tax is towards the reparation of the Premisses: And *Bramston*, Ch. Just. took this difference, that if a Stranger covenants to pay charges towards repairing such a Wall, that that is not within the Commissioners jurisdiction, because he is a mere Stranger, and not within their Commission, and therefore they cannot take notice of such a Covenant; but otherwise it is where the Covenantor is the occupier of the Land, for there the Person and the Covenant are within their jurisdiction, and they may tax him for reparations according to his Covenant: It was likewise resolved, that the charge upon the Executor was legally imposed; And whereas it was objected, That the term was determined, and peradventure the Executor hath not assets: It was answered, That the Executor was an occupier at the time of the Decree, and therefore was within the words of the Commission; And he having not

not alledged before the Commiſſioners, that he had no aſſets, he hath loſt that advantage, and it ſhall be intended that he hath aſſets, by his not gainſaying it: And accordingly the Court confirmed the Commiſſioners Decree againſt the Executor, *March* 198, 199, 200, 201.

43 *El.* 4. It appears by the Statute of 43 *El. cap.* 4. That if Lands, Rents, Annuities, Goods or Chattels, be given towards the repairing of Bridges, Ports, Havens, Calceys or Sea Banks, that the ſame ſhall be ſo employed by that Statute: So that Goods, Chattels and Annuities, be chargeable to theſe repairs by the force of that Statute, as well as Lands, Houſes and Grounds, in caſe any ſuch thing ſhall happen to come before the Commiſſioners of Sewers, and they may compell the performance, *March* 200.

But note beſides all the former matter, That an Heir ſhall not be bound by the Covenant of his Anceſtor, though he have aſſets deſcended, unleſs he be bound expreſly by the word *Heirs* in the Covenant.

Uſus rei.

I Now intend to declare where uſe ſhall tie one to the repairs of the Defences mentioned in this Law (I do not hereby mean that uſe which I have formerly mentioned in Preſcription and Cuſtome, which is uſe to repair) but the uſe I intend in this place, is, the uſe which one is to have of the defence or thing which is to be repaired: As where one and his Anceſtors have uſed to have the uſe of the River or Waters by ſailing up and down the ſame, or have uſed to have a Ferry on or over them, or a Staith to go up and down, or a Crane to draw up Waters, or ſome other Engine to draw up the Waters for the uſe of their Houſes; Theſe uſes which men have of theſe things may be cauſes

and

and conſiderations ſufficient to tie them to the repairs of the Walls, Banks and Rivers: And for warrant in this learning is the Book of 37 *Lib. Aſſiz. plac.* 10. for there were ſome perſons which were bound to repair the River, becauſe they had paſſage on it with their Boats, and others were charged becauſe they had free fiſhing in the River; and in my Opinion it ſtands with good reaſon, and agreeable to Law, That thoſe perſons, before others, ſhould be bound and tied to the repairs of ſuch things whereof they have peculiar and ſeveral profits and uſe of more than others have: And it is manifeſt, that this very Statute aims full at this point, when it directed that ſuch perſons ſhould be rated, taxed and ſeſſed towards the repairs, which had profit of fiſhing and other Commodities in the Rivers. 37. *lib. Aſſiz.*

But leſt ſome may miſtake my meaning and learning alſo in the ſaid former Caſes, I will therefore make the ſame plain by diſtinction, which is this, That Frontage, Ownerſhip, and this uſe I laſt ſpake of, do not bind any to the repairing and maintaining of Walls, Banks, Bridges, Sewers or other Defences, when and where any other man or Corporation be bound to do the ſame by Preſcription, Cuſtome, Tenure or Covenant: For the ſaid three parts, Frontage, Ownerſhip and *Uſus rei*, be but implicite ties onely in conſtruction of Law, and ſerve the turn onely when no other perſon or perſons are bound expreſly thereunto; and this diſtinction may be maintained by the Book of 8 *H.* 7. *fol.* 5. and other Books, where it is ſaid, *That he whoſe Grounds are next adjoining is bound to repair, unleſs ſome other be bound to do the ſame by Tenure or Preſcription*: Whereby it followeth, that if one be bound to do the ſame by ſpecial Tenure or Preſcription, it freeth the Frontager. 8 *H.* 7.

Note alſo another difference, that in caſes where a Frontager and one who hath *liberum paſſagium* on the River, and a man which hath a free Piſcary there, are not any one of them bound to make the repairs alone, but all alike together; and ſo is the Book of 37 *Aſſiz. plac.* 10. and I ſuppoſe

37. 38 Ass. pose the Book of 38 *Assis. plac.* 15. maintains this point with me; for there the Law is declared to be, *That he which is bound by prescription to repair, is bound peremptorily alone to do the work, and not any other; and if no such person can be found, then the parties whose Grounds do adjoin, and those which have free fishing in the River, and free passage thereon, be all of them to do and perform the same jointly, and no one of them is discharge for the other, because they shall be in* common call. So by this which hath been said touching these matters, the Commissioners may see and behold how carefully and understandingly the Laws of this Realm have indeavoured to do equal Justice; and my desire is, that they would as carefully put them in execution.

A Township assessed.

IT hath been held for a great question, Whether a Township or Hundred in general might be assessed and taxed to the Sewen, without imposing the same on particular Persons? And Sir *Edward Cook* in the Case of the Isle of Ely, is of opinion directly, That a Tax, Rate or a Sess could not, nay might not be set or imposed upon a Town or upon the Inhabitants of a Town; for, saith he, *The taxation, assessment or charge ought to have these qualities; It ought to be according to the quantity of their Lands by number of Acres and Perches, or by the tenure of profit of fishing and Common of Pasture, which of it should be laid upon a Town, it would hold none of these proportions:* and his opinion is not alone in this very point, for in the ancient Charter of *Romney Marsh*, pag. 30. it is said, *Quod unusquisque proportione, ac periculo incumbentium æquè contribuat*; And page 121 and 39. of the same Charter, the Taxation is expressed to be by Acres, Perches and Carucates; and our Statute in express words is, *And all those persons and every of them to rate and assess, charge, distrain and punish, as well within the Limits, Leets and Bounds of old time accustomed, or otherwise, or elsewhere within this Realm of* England, *after the quantities*

Case of the Isle of Ely.

Romney Marsh Case.

of

of their Lands, Tenements and Rents, and by the number of Acres and Perches, and after the rate of every person's portion, tenure or profit, or after the quantity of their Common of Pasture, or fishing, by such ways and means as you the Lord Fitzwilliams, *Sir* Francis Vane, *and Sir* Thomas Mounson *Knight and Baronet, Sir* Edward Dimock, *Sir* William Armin, *Sir* Thomas Grantham, *Sir* George Fitzwilliams, *Knights*, Richard Totheby *and* Edward King, *Esquires, whereof three to be of the* Quorum, *shall seem most convenient*: These words literally taken, afford the construction to be according to the opinion of Sir *Edward Coke*.

And of the same opinion with Sir *Edward Coke*, *viz.* that a whole Township cannot be assessed upon the Commission of Sewers, Justice *Doddridge* declared himself to be in the Case of *Hetley versus* Sir *John Boyer* and others, *Hil.* 11 *Jac. B. R.* and his reason was, because then upon such an assessment one man may be charged with the whole; *Bulstrode* 2. 199. *Cro. Jac.* 326. And *Roll. Mich.* 1649. in the case of the Inhabitants of *Outwell*, held that a Tax imposed by the Commissioners of Sewers ought to be particular, and not to be laid upon the Township; unless there were a particular custome for such Township to be so rated or taxed, *Style* 179.

But on the other part I find by many ancient Books and Authorities of the Law, that Taxations and Charges have been generally laid upon Townships and Hundreds in matters of this kind, as in the 37. *Hen. Assize plac.* 10. Four several Townships were charged with the repairs of a River, because they had passage thereon with Boats; and in 38. *Hen.* 37 & 38 *Assi.* *Assiz. plac.* 15. a Township was there charged with the repair of a Bridge: And the Statute of *Magna Charta*, *cap.* 15.

quod nulla villa nec liber homo distringatur facere pontes nisi qui ab antiquo facere consueverunt; so that if *ab antiquo* a Townſhip had uſed to repair Bridges, it was tied thereunto by the implied conſtruction of this Statute: And the Sta-
22 H. 8. 5. tute of 22 *H.* 8. *cap.* 5. gave authority to Juſtices of Peace to charge a County, Hundred or Town with the repair of Bridges, if no certain Perſon were ſpecially tied to the repair thereof: and many times in ancient Statutes and Books of our Law, we ſhall find Townſhips and Hundreds charDr. and Stu. dent. ged generally, as in *Doctor* and *Student*, *fol.* 74. a Townſhip was amerced; and by the ancient and famous Statute Stat. Winton. of *Winchester* a Townſhip ſhall be amerced for the eſcape of a Robber by the High-way: And 3 *Ed.* 3. Title *Corone* 3 Ed. 3. in *Fitz.* *pl.* 293. a Townſhip was amerced for the eſcape of 11 H. 4. 2. a Murtherer; and in 11 *H.* 4. 2. *Brook* 94. a Town was ſeſſed for the expences for the Knight of the Parliament, and it might be levied on any Perſon's goods of the Town; and this was for the uncertainty of the Perſons, and for the infiniteneſs of the number of them, as it is ſaid in *Richard Godfrey's* Caſe.

But it may perhaps be objected on the other part, That if a Town or Hundred may be jointly taxed, then it might ſo come to paſs, that one Man's Goods which had no Grounds ſubject to the charge, and which could reap nor take any hurt thereby, might come to be diſtrained for the whole tax, rate or ſeſs of the Town; and another man which had great quantities of Grounds there ſubject to danger might eſcape free; and therefore ſuch expoſition to be made of the ſaid Law, were not within the rule and compaſs of equality.

And another objection may alſo be made, That it is true, that by an expreſs Statute or Cuſtome, an aſſeſs, rate or tax, may be laid upon a Town or Hundred, as was done by the ſaid Statute of the 22 *H.* 8. and others formerly mentioned; but ſuch expoſition were contrary to the letter of this Statute of 23 *H.* 8. of Sewers.

I do confeſs, that if theſe two objections could not be anſwered, I ſhould change my Opinion: It is true: That if a tax or ſeſs had been ſet upon a Hundred by the ſaid Statute of *Wincheſter*, for the eſcape of a Robber, and that charge had been levied upon one man's goods of the Town, as it might have been, he had had no remedy to cauſe his fellow Townsmen to be contributers to him to bear equal ſhare with him; and ſo if the party robbed had recovered by Action againſt the Hundred, and the goods of one in the Hundred had been taken in execution, he had no means to get contribution: And yet that Law carried that defect with it three hundred years, or thereabouts, till in the 27th year of Queen *Eliz. Chap.* 13. wherein Order was taken, that if ſome one or few mens goods were taken in execution upon the recovery in an Action taken againſt the Hundred by the party robbed, he or they ſhould have contribution, which before that Statute of 27 of *Elizabeth* could not be had. 27 *Eliz.* 13.

But to give anſwer to the two objections; First, if in our caſe of the Sewers, a Townſhip ſhould be Taxed, yet this Tax could not be taken or levied, but onely of ſuch as had grounds within the charge, which had good by the repair, or might have hurt by the neglect thereof; for in 11 *H.* 4. *fol.* 35. it is ſaid for Law, *That if a Town be aſſeſſed in the Tax, and the Collector doth diſtrain the goods of a man of the Town who was not chargeable thereto, that party may have and take his Action of Treſpaſs againſt the Diſtrainer and Collector, for that he at his peril muſt look well to it, that he whoſe goods were taken were ſubject to the charge.* 11 *H.* 4. *f.* 35.

So in our caſe of the Sewers, if the goods of one which was not ſubject to the Tax or Aſſeſs impoſed were taken, he might have his Action of Treſpaſs againſt the Diſtrainer, and ſhould recover his damages thereby; ſo this ſalve cures one of the ſaid maladies.

But then the caſe goes farther, *That if the goods of one man of the Town ſhould be taken for the whole Seſſe of the Town, and he is ſuch a perſon as in truth is chargeable thereunto,*

mulo, he can have no Action against the Distrainer for taking his Cattel, for he is such a person as cannot excuse himself but that he is chargeable: This indeed draws the Case to a desperate issue, for this seems to be as great a mischief as ever the Statute of *Winchester* did ever suffer, which was remedied by the said Statute of 27 *Eliz.* but our Case hath not such a Cure provided; Therefore it puts me to the old adage of Law, *Better it is to suffer a mischief to one or more particular persons, than to permit an inconvenience to the whole Commonwealth which concerns a multitude:* But yet I shall give this objection a better answer, I hope, than with an old adage; for in our Case the party whose goods are taken for the whole town, is not without a fitting and convenient remedy; for when his goods be taken and he is constrained to pay the whole sessment of the Town, he may make his complaint to the Commissioners of Sewers, and may give in the particular names of every Townsman, and the quantity of each mans Estate which be charged thereto, or the true value of their Lands, and may crave of the Commissioners of Sewers for to make a Law to make them all to contribute, every one according to his portion of Land: And in my Opinion the Commissioners of Sewers have power to impose a proportionable rate upon every of them, according to the quantity and quality of his ground, by way of contribution, and may award Process to force and compell them to pay the same to the said party; whereby it plainly appears, that the party so distrained hath a direct remedy to come by his losses. In *Doctor* and *Student* a whole Town was amerced, and they met together by common consent, and assessed and rated every man equally according to his ability, and allowed of as a good cause.

But Commissioners of Sewers may if they can come to the knowledge of the certainty of every man's Estate, rate in the primary and original Sesse every person according to his several quantity of Estate, which may be done in this manner, when the Commissioners be agreed how much to lay upon such a Town, then to send for three or four of the

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Inhabitants, and cauſe them to give in every man's Eſtate; and to make and appoint them Seſſors to rate every man, or elſe the Commiſſioners themſelves, having true intelligence of every man's Land, may eaſily ſet the rate and charge upon every particular perſon in an even and proportionable ſum; and thus every man at the firſt ſhall know his own rate, as in the aſſeſſing of the Subſidy, and no man ſhall be burthened with his Neighbours charge; and theſe were good courſes to be uſed within both the letter and ſenſe of theſe Laws: And this courſe was uſed by the Four and twenty Jurators in *Kent* in *Rumney Marſh*, who alwaies upon their Oaths ſet down every particular man's grounds in certain, and their juſt quantities, and accordingly were the parties ſeverally taxed. *Chart. of Rumney. pag. 50.*

And if the Commiſſioners of Sewers do in the primary and original ſeſs, rate every Perſon according to his ſeveral quantity of Land, they ought (as it ſeems) to deſign in certain the Perſon whom they tax: And therefore by the opinion of *Roll*, *Paſch.* 23 *Car.* 1. if they rax a Man, and his Aſſigns, or the Land of ſuch an one, and his Aſſigns, that is too generally expreſſed, and the tax ill; for there is no rule how to levy the money equally upon ſuch a tax, *Style* 13. And whereas afterwards in the Caſe of the Inhabitants of *Outwell*, *Mich.* 1649. it was ſaid by *Roll*, That ſuch tax ought to be laid upon the number of the Acres, and not upon the Perſons of the Inhabitants, *Style* 185. By that I conceive he means, that in the taxation of every man the Acres ought to be ſet down, in reſpect of which he is taxed: For otherwiſe if the

Perſons

Perſons ſhould not be named in the tax, there could be no diſtreſs taken of the Goods of the Owner of the Lands (for the uncertainty who is Owner) unleſs upon the Lands themſelves which are charged; which would be inconvenient, and a great obſtacle to the execution of this Commiſſion.

Howſoever the Tax in my Opinion generally impoſed upon the Town is good, as appears by many Authorities and Books before remembred, even by this Statute, as well as by Cuſtome; for in the ſaid Book of the 37 and 38 *lib. Aſſiz.* it doth not appear that the Townſhips there rated were ſo taxed by any Cuſtome, but meerly by the Law of the Land; and ſo is the learning delivered to be in the Council's Order aforeſaid. 37 & 38 *lib. Aſſiz.*

And I do remember, that at the Aſſizes held at *Lincoln* in *Anno* 12 *Jacobi*, in a Tryal before Sir *Edward Cook* then Judge of Aſſize, in the Caſe of Sir *Philip Conisby* Knight, the Town of *Mauton* was aſſeſſed five pounds, and *Twigmore* as much, and a diſtreſs was taken for non-payment thereof, and was juſtified in a Replevin, and the verdict paſſed for the diſtrainer, and no great ſcruple was then made of the ſaid Aſſeſs laid and impoſed generally upon the Towns; which Caſe I ſpecially noted, becauſe it was tryed and paſſed for current before the ſaid Sir *Edward Cook*, who had the year before reported the Law in his *Tenth Report* to the contrary. And I am alſo of Opinion, that if a new defence be agreed to be made, as a Wall, Bank, Sewer or any other, and a Seſſe is appointed for this work, and laid upon a Town, That the ſame is a good Seſſe and well laid, as well as in the Caſe of old repairs, where Cuſtome may give Warrant unto it, and the Commiſſioners in their diſcretion may ſo do in imitation of the ſaid former rules and preſidents, and it ſtands with good wiſedom and diſcretion to imitate and follow ancient and approved Laws and Statutes

tutes made in Parliament, which are done by the wiſedom of the whole Realm: And in my conceit a decree made which hath no reference or dependency to former preſidents, may be doubted whether it be legitimate or not, having no ancient Laws to patronize it. And thus I conclude my third point of my Caſe, That a Townſhip may be taxed by the Laws of Sewers.

Tythes.

HERE is likewiſe in my Caſe a Parſon rated and ſeſſed for his Tythes, and is now to be put to the queſtion, Whether by theſe Laws he may be taxed for them, or not. The ancient Commiſſions of this kind have very ſtrict words in them to tie every one to the charge of theſe Defences, being for the preſervation of the Commonweal; and this Statute extends it ſelf with a long and large arme to fetch and reach every Man that hath Grounds lying within the Level, and which partake of the good which the Defences bring to them, to be contributory to the charge.

It is true that Eccleſiaſtical and Spiritual Perſons, as Parſons and Vicars hold their Eccleſiaſtical Livings exempt *ab omni onere ſeculari*, for they do not hold their Churches of any Lord, but of the Lord of Heaven, in reſpect of the ſpiritual ſervice they doe therefore: And I take it that Parſons and Vicars hold not their Churches in free Alms, for then the Founder ſhould be their Lord in point of tenure and ſervice, which I have not obſerved to be ſo in any: And in our Law-books it appears, that ſpiritual Perſons were exempted from lay and temporal charges, as in *Magna Charta, cap.* 14. *A ſpiritual Perſon ſhall not be amerced according to his ſpiritual Living*: In *Fitz. Nat. bre. f.* 228. there is a Writ directed by the King to his Officers and Miniſters, forbidding them that they take not any Toll, Murage or Pontage of eccleſiaſtical Parſons, Vicars and ſuch like; and the ſaid Writ ſheweth, that by the Cuſtome of

Mag. Ch. 14.

Fitz. Nat. bre.

the Realm no ſuch exactions ought to be taken of them: And there is another Writ there to diſcharge them for paying Cuſtoms *de bonis ſuis Eccleſiaſticis vel de aliis pro ſuſtentatione ſua emptis*; And alſo they have this privilege, That the Sheriff nor any Lay-officer are not permitted to meddle with their eccleſiaſtical Poſſeſſions; for in 20 *H.* 6. *fol.* 20. and in many other Books, it is held, that in a Writ of Summons the Sheriff may not ſummon a ſpiritual Perſon on his Spiritualities, but he muſt rather return that he is *Clericus beneficiatus non habens laicum feodum*; and upon this return the Party is to take a Writ directed to the Biſhop, to ſummon him on his Spiritualities: And therefore if the Poſſeſſions of ſpiritual Perſons are had in ſuch great eſteem in our Law, what then ſhall be done with Tythes which are ſaid to be due *Jure Divino*? I have not read that they ſhall be charged to any thing but to the repair of the Temple; in the 18th Chapter of *Numbers*, the 21, 22, 23, 24, 25, 26, 27, and 28th verſes, The Lord ſaid, *I have given to the Children of Levi all the Tenth in Iſrael for an Inheritance*; and yet the *Levites* paid a Tenth thereout to the Prieſts; and ſo Clergymen in times paſt paid a Tenth to the Pope; and in imitation, or rather in reformation thereof by the Statute of 26 *H.* 8. *cap.* 3. the like is now paid to the King, as ſupreme Head and Governour of the Church here on Earth: So here be charges paid out of the Tythes, but they be ſpiritual charges. And in Mr. *Selden's* Hiſtory of Tythe, *pag.* 13. it appears by collection and connexion of Stories divine, That the firſt or the firſt year Tythe was paid to the *Levite*, The ſecond to the Feaſt at *Jeruſalem*, and the third to the Poor: And had not the Statute of 43 of *Eliz. cap.* 2. made the Parſon and the Vicar liable and chargeable to the relief of the Poor, which was in imitation as it ſeemeth of the *Moſaical* Law, they had not been bound or tied to doe the ſame; for it is held to be more charity to relieve the Church than the Poor: And in payment of Taxes and Subſidies they are granted in their Convocation-houſe, a Council merely

20 *H.* 6. *f.* 20.

18th Chapter of *Numbers.*

26 *H.* 8.

Selden.

43 *Eliz.* 2.

conſiſting

conſiſting of the Clergy, and then are confirmed in Parliament, of which Houſe alſo they are a Member. And therefore in my opinion, ſeeing Tythes are ſo ſacred a duty, that a Lay-man could not have any help for at the Common-law, and were exempt from temporal and prophane uſes, I am therefore of opinion, That they are not to be rated or taxed by the general words of theſe Laws; Yet I am of opinion, That Tythes in the hand of a Temporal or Lay-man are to be rated by theſe Laws, for when they are come into his hands, *Tunc res ſpirituales fiunt temporales & tranſeunt decimæ in Catalla.*

But I muſt here leave theſe Eccleſiaſtical perſons and their Church livings: There is another point of this Law will reach unto ſome of their poſſeſſions, as to their Glebe Lands which belong to their Churches, and their Meadow and Paſture grounds, for theſe be not ſacred, as Tythes be, But came to them by the benevolent gifts of Laymen, and not *ex dono dei & evangelii* as Tythes did; and ſo they took that burthen with them from the Lay-donor, which after may be impoſed upon them: And therefore ſuch Parſons, Vicars or other Spiritual perſons which hold a plough Land in *Culture*, are chargeable by the Statute of *2 Mar.* towards the repair of the High-ways, as other Lay men be: But in that Statute there be Eccleſiaſtical Officers uſed, as Churchwardens, whereby it was conceived, that that Statute had an eye to bring Eccleſiaſtical perſons within the reach of it: And ſo for their houſes and grounds I take them to be within theſe Laws of the Sewers, for the King's own Lands are alſo chargeable thereunto, and yet on earth within His Dominions He is ſaid to be *caput Eccleſiæ*, and as much reaſon were it to exempt His poſſeſſions as theirs, if the reſpect of the perſon ſhould bear any ſuch ſway in the Caſe. 2 *Mar.*

Alſo I do find by divers ancient Records, That Abbeys, Priories, and other Spiritual poſſeſſions, have been chargeable to the repair of Bridges, Calceys, Banks and High-ways, by Cuſtome and Preſcription, as appeareth alſo by the Books of 11 *H.* 4. *fol.* 82, 83. and 44 *Ed.* 3. *Fitz.* Title *Bar.* 11 *H.* 4. 44 *Ed.* 3.

Bar. pl. 301. and I take it, that by a very expreſs and ſpecial Cuſtome or Preſcription, a portion of Tythes in a Clergy mans hand may be charged with the repairs of Bridges, Waies, Walls or Sea Banks, but not without a direct affirmative Cuſtome; for I ſuppoſe that they may as well indure a charge in this kind, as a charge in a *Modus decimandi*.

And ſo I conclude this part of the Caſe, That the Parſon was not to be ſeſſed for his Tythes by the general words of this Law.

Notwithſtanding the opinion of our Reader here; It ſeems that Tythes, though in the hands of a ſpiritual or eccleſiaſtical Perſon may be rated or taxed by the Commiſſioners of Sewers by the general words of the Statute of 23 *H.* 8. 5. For it was reſolved 5 *Car.* 1. by all the Judges of *England* (as Sir *Nicholas Hyde*, heretofore Chief Juſtice of the *Kings Bench*, reported) that Tythes are at this day chargeable with all charges impoſed by any Act of Parliament, wherein they are not particularly excepted, as upon the Statute of 43 *Eliz.* to the Poor, to maimed Souldiers, *King's Bench*, *Marſhalſey*, Bridges, *&c. Parſons* Counſellor, *part* 2. *cap.* 15.

A Copyholder.

HERE is alſo a Copyholder taxed within my Caſe for his Copyhold Land, and whether he for his Copyhold, and the Lord for the Freehold of that ſoil, ſhall be aſſeſſed therefore, is another queſtion.

A Copyhold by the Cuſtome of the Manor yieldeth and affordeth to the Lord Seigniory Rent, Fines due upon admit-

admittances, and ſuch like duties; but the Copyholder hath the real and viſible profits of the ſoil, and therefore both Lord and Copyholder receive *Et commodum & ſalvationem*, by the ſaid defences: And therefore the words of this Law be exceeding copious and full in this point of ſeiſ (*viz.*) To inquire who hath and holdeth any Lands or Tenements, or Common of paſture, or fiſhing, or hath or may have any hurt, or damage or loſs by any means, in or near the ſaid places; and in this caſe the Lord holdeth the ſaid Land in Tenure, though not in *Culture*, and many ways may have hurt and damage; As if the Copyhold were overflowed by the Sea, the Lord ſhould loſe his Freehold of the ſoil, his Seigniory, yearly Rents and Fines for admittances, and all other *perquiſites*: So that the ſaid words of this Statute beat mainly upon him. But as there be reaſons to be urged againſt him, ſo there be matters to exempt him from this charge, and to lay the burthen on the Copyholder.

First, though he be Lord of the Copyhold, yet he is ſeized of the Freehold thereof, but in Imagination and conſtruction of the Law, for the Copyholder is pernor and taker of the viſible and ſubſtantial profits. 1.

Secondly, the charge of repairs reſpects the poſſeſſioner *in preſenti*, which is eaſie to be found out, and not imaginary owners as the Lord is. 2.

And Thirdly, if the Lord and owner ſhould both be charged *pro una eademque re*, which the Law doth never permit, for this is not like the Caſe of Lord and Commoner, where they there ſhall be charged, the one for his ſoil, and the other for his Common; for in this Caſe the Lord is the immediate proprietor of the Soil, and he hath the preſent and real occupation thereof, as well as the Commoner hath the uſe of his Common; and therefore they ſhall both be taxed to theſe repairs *diverſis tamen reſpectis*. 3.

But for the Copyholder it may be objected, that he is not within this Statute; for in *Heidon's* Caſe in 8 Jac. *Edward Cooke* 3d *Report*, it is truly ſaid, *That a Copyholder is not within the Laws and Statutes which alter the Service, Tenure, Intereſt* Heidon's Caſe.

Interest of the Land, or other thing in prejudice of the Lord; and this is the cause that a Copyholders Lands cannot be extended or put in execution upon the Statute of *Westminster the Second*, nor in extent upon the Statute of *Acton Burnel* and *De mercatoribus*, for if they should, then might the Sheriff make the Lord new Tenants, without surrender and admittances, which is contrary to Custome, the life and essence of all Copyholds; yet there is another good rule put in the said Case of *Heidon*, that is, *That where a Statute is made for the general good and wealth of the Realm, and that no prejudice can come to the Lord by alteration of Tenure, Service, Estate or Custome, there Copyholds may well be within those Statutes*; Therefore now it is to be considered, whether this Statute of Sewers will in any sort hurt or prejudice the Lord or no; for it is certain, that these Laws tend as much to the wealth and welfare of this Realm, as any can do; and in rating and assessing these Copyholds to the repairs of Banks, Walls and Sewers, &c. it alters neither the Copyholders Interest, nor the Lords Tenure, nor doth it in any sort prejudice the custome of the Manor.

But then it may be objected, That if sesse be imposed upon a Copyholder for his Land, and be not paid, these Laws give sale of Lands, which indeed is the onely clause of this Statute which is material, to exempt a Copyholder out of these Laws; for clearly I take it, That Commissioners of Sewers have no power to decree the Copyhold Land away for non-payment of the sesse: Yet I am of Opinion, that a Copyholder, though he be not within that part of the Statute which giveth sale of Lands, yet he is within the other part thereof, for divers Reasons.

One I find by experience, and in divers presidents, that many Copyholds have been and be charged with repairs of Bridges and other Defences in divers parts of this Realm by Customs: Also if a Lord grant a Copyhold to *J. S.* and his Heirs by Copy, *Tenendum* by the repairs of such a Wall, Bank or Bridge, this bindes this Copyhold thereto in point of charge.

And

And laſtly, this Statute bindes ſuch to the repairs which may have good by the doing, or hurt by the neglect: And it is apparent, that by overflowing or inundation, a Copyholders Land ſuſtains equal damage with other Lands; and for theſe Reaſons I reſolve that a Copyhold is within theſe Laws. And ſhortly touching Copyholds, I do confine them to theſe four heads.

My four Tenents concerning Copyholds.

First, a Copyholder is ſeſſable towards theſe repairs for his Copyhold. 1.

Secondly, that the Lord of the Copyhold is not to be taxed for the Soil of the Copyhold; for although he might come to it by forfeiture committed, yet that is a foreign poſſibility: and although he be ſeized in Law of the Freehold, yet becauſe the Iſſues and Profits go with the Copyholder, this Law therefore will not charge him for the Soil. 2.

Thirdly, in reſpect the Copyhold rent is a rent of Aſſize, and rents be within the expreſs letter of this Statute, and becauſe his rents by the overflowing of the Sea be loſt, therefore the Lord ſhall be aſſeſſed for it if it be of value. 3.

Fourthly, I am of opinion, that a Copyhold may not be ſold by the Commiſſioners of Sewers, and yet Copyholders be within other parts of this Law. 4.

Now becauſe it is a high point in this Statute, in what manner to rate, tax and aſſeſs by the judicious power of theſe Laws: and in regard my Caſe toucheth all manner of Seſſes and Rates which be or may be impoſed by theſe Laws, I will therefore ſpread it abroad: and I do intend to treat of what Lands and other things are to be aſſeſſed, towards the repairs in my Caſe, and what perſons to be aſſeſſed, and in what degree.

Wherein firſt I am of opinion, that one is not to be aſſeſſed for his high and deſcending grounds, for ſo it appears was the opinion of *Bridnel* in the 12 *H.* 8. *fol.* 3. where he ſaith, *That if a man's ground be ſurrounded with Waters, he may make a trench in his own grounds to let the Water run down-* Regiſter.

downwards, and to descend upon his neighbours grounds, for water is an element descendable (jure naturæ) And also high descending grounds can have no such use of Walls and Banks, as other grounds situate lower may have, for the Waters can have no force against them, and therefore the owner is not chargeable therefore; and the words of the Commission expressed in the Register be, *Qui defensionem Commodum & saloationem per Predict. Wallias, Gutturas, Pontes, Calceta & gurgites habere poterint nullatenus parcantur.* And the Charter of *Rumney Marsh* seems to bear the same sense (*viz.*) *Quod pro securitate dicti Marisci distinctiones fiant ita quod æque fiant secundum portiones majores & minores quas homines habent in eodem Marisco*; But high grounds by nature need not Engines of art to defend them: And in *Rook's* Case in Sir *Edward Cook's* 5th *Report*, and *Keighley's* Case, it is truly declared, *That the grounds lying on the Level which are in apparent danger subject to surrounder, are onely chargeable to repairs by this Law*; But yet grounds lying on high Mountainous places may be by Custome, Prescription or Tenure liable and stand chargeable to repairs of Walls, Banks, Sewers, Goats and other Defences: And in such cases though they be never so high, yet these Laws will reach unto them, but no charge is to be imposed on them by this Statute, and by force thereof onely, without a special Custome or Prescription to warrant the same.

Rook's Case.

Annuity.

IF a Dean and Chapter or other Corporate persons or Body Politique be by Prescription to pay a yearly Annuity to *J. S.* and his Heirs, *J. S.* is not sessable for his Annuity, yet the said Corporate or Politique persons pay the same in respect of their Lands which lie in danger of surrounding, and so the grounds be subject to these Laws, but it issueth not thereout: And the said Corporate and Politique persons are not charged in their Lands, but in respect of their Lands to pay the same.

Commons.

Commons.

THoſe perſons which have Common of Piſcary, Turbary or of Paſture in great Fens, Mariſhes and Waſtes, may be charged, but Commoners in *agris ſeminatis* after the corn ſevered, as ſtock Commons which be of a ſmall value, are not to be charged for their Commons, but for their Lands.

Ferry.

HE which had a Ferry over a River was in 37 *lib. Aſſiz. pl.* 10. charged to repair the River, and ſo for a Ferry one may be charged by this Law.

Herbage.

HE which hath the Veſture or Herbage of grounds, as *Prima tonſura vel veſtura terræ*, may be charged to the repairs.

Free paſſage.

IT appears likewiſe, that thoſe perſons which had paſſage for their Boats on the River, were to be rated towards the repairs in 37 *Lib. Aſſiz. pl.* 10. but this is to be intended of thoſe perſons which had free and cuſtomary paſſage thereon, as a liberty and inheritance, and was not meant or intended of poor Boatmen which come thereon with their Boats accidentally, by the general Cuſtome of the Realm.

Parks, Warrens, Chaſes.

A Man for his Park of Deer, and Warren of Conies, ſhall be charged if theſe liberties lie within the Levels; but for Chaſes I ſuppoſe one is not chargeable onely, for Deer which be *ſuæ naturæ* not bound to certain precincts, but in that Caſe the owner is onely to be taxed for the Soil.

Mart, Fair or Market.

ALSO if one have onely the liberty of a Mart, Fair or Market to be kept in a place which is ſubject to ſurrounder, In my Opinion, becauſe they are but caſual in their profits, and not continual in their being, although they be conſcribed to place and circuit, yet being no part of the Soil, nor of the iſſues and profits thereof, they are not taxable within theſe Laws.

Offices.

THE Office of the Clerk of the Market, Town Clerk, or ſuch like, although theſe Officers be confined to a certain place and precincts within the Level which is ſubject to ſurrounder, are notwithſtanding exempt from theſe taxations.

Proxies, Synods.

HE which hath Proxies or Synods of Annual ſums of money, ſuch as was in the Caſe of *Proxies* in the *Iriſh Reports*, is not ſeſſable within this Law; for although the perſon is charged therefore in reſpect of the grounds, yet the ſame doth not iſſue thereout.

The Morgager for the Title he hath by the Condition to reduce the Lands back again to him, or he which hath Title

tle to Land by Action, Condition or Entry, or he which hath a contingent uſe ſhall not be taxed for them.

Neither was *Ceſtuy que uſe* at the Common Law before the Statute of 27 *H.* 8. of uſes, nor is the Bargainee of Land before the Deed be inrolled ſeſſable by this Law. 27 *H.* 8.

Neither is one who hath the preſentation or nomination to a Church as Patron, or he which is Founder for his Founderſhip, Taxable within this Statute, yet they be Tenements, the largeſt Words of charge within this Law; but the Law intends the immediate poſſeſſion of ſuch Tenements which be proficuous, and not theſe things which be Tenements in Law, and which be but conveyances, and their fruit is Ceremony without Subſtance.

This Law ſetteth down ſuch things for the which one is chargeable, *viz.* (*He which hath Lands, Tenements, Rents, Common of Paſture, Profit of Fiſhing or other Commodities, and ſuch as have Safety, Profit, Defence or any other Commodity*) Theſe be the Words of charge recited by this Law: This Word *Land* is of large extent, for it reacheth to Houſes, Arable, Paſture, Meadow, Mills, Toſts, and to all other Edifices, Moors, Mariſhs, Woods, Wood Grounds, for all theſe the Earth is the ſubſtance *Et omne ſolo cedet*, and the ſeveral increaſes thereof be but qualities.

The Word *Tenements* is of larger extent than Lands; for it containeth all which the Word *Lands* doth, and all things elſe which lie in Tenure: ſo that I think it ſhall be but labour loſt to enter farther into the particulars thereof

Lord and Tenant.

IF there be Lord and Tenant, and the Tenant holdeth of the Lord by yearly Rent ſervices, the Lord may be rated as well for his Rent, as the Tenant for his Land, to Annual repairs, as well as to accidental, by reaſon of theſe Words in the Statute (that is, *That every one be rated and taxed according to the rate of every perſons Rent, Tenure or Profit,*)

here be full words to charge the Lord for his Rent; and ſo Rent charges, and Rent ſeck ſhall be ſubject to ſeſſes in this kind: for otherwiſe the Tenant of the grounds may be undone thereby, in regard the Rents going and iſſuing out of the grounds may amount to as much almoſt as the yearly value of the grounds do: But if the Rents be ſo ſmall as they are ſcarce worth the gathering, then in diſcretion the Commiſſioners may ſpare them, for *De minimis non Curat Lex.*

Alſo whether the remainder man, and he in Reverſion depending upon an Eſtate in Tail, ſhall be rated and taxed, or not, by the power of theſe Laws, is an apt queſtion for this place; and therein my Opinion is, That being dry and fruitleſs Remainders and Reverſions, they ſhall not be ſeſſed to the repairs, but the Tenant in Tail in poſſeſſion ſhall be ſolely charged; for it is more to be feared, that Tenant in Tail will cut off the Remainder and Reverſion by a Recovery, than that the Sea ſhall drown his Eſtate by an overflow.

Leſſee for years, and he in reverſion.

IN the Caſe of the Leſſee for years and for life, and thoſe in Reverſion and Remainder, there is a greater cauſe of diſpute than between Tenant in Tail, and he in the Reverſion: And becauſe it is an often Caſe, I have therefore taken the more pains to reſolve the ſame.

Jeffrey's Caſe. Firſt, the Leſſee is in the preſent poſſeſſion, and ſo is ſubject to all ordinary charges; and with this agreeth *Jeffrey's* Caſe in Sir *Edward Cook's* 5th Report; for there the Caſe was reſolved, that where the Inhabitants of a Town were aſſeſſed towards the repair of a Church, there the Leſſee for years was charged, and not the Leſſor, though he had a yearly Rent reſerved.

And the ſame reſolution was by all the Judges of the *King's Bench* in the Caſe of *Paget* and

and *Crumpton*, *Paſch.* 41 *Eliz.* upon view of *Jeffrey's* Caſe, *Cro. Eliz.* 659.

For in point of the Rent this Caſe and that will differ, by reaſon Rents be expreſly within this Law; but I now ſpeak of a Leſſee where no Rent is reſerved: In 17 *Ed.* 4. *f.* 6. a tenth was granted to the King by Parliament, of the value of their Lands, and the Leſſee for years was charged therewithall, and ſo was the Law there taken, if the Parliament had given the tenth part of the iſſues and profits of the Lands. 17 *Ed.* 4.

The Caſe of the Proxies in the *Iriſh Reports* doth in my opinion in reaſon reſemble this Caſe; for the Caſe was there, *That the Biſhop of* Meath *in* Ireland *had a Proxy of fifteen ſhillings payable out of the Commandry of* Kells, *then parcell of the Poſſeſſions of St.* John's, *all which came to the Crown by the diſſolution of Monaſteries in that Kingdom; and after the ſaid Biſhop granted the ſaid Proxies to Queen* Elizabeth, *and after Queen* Elizabeth *made a leaſe of the Commandry to Dr.* Forth, *reſerving a yearly rent, without mentioning the Proxy*; And it was there reſolved, *That Doctor* Forth *the Leſſee for years ſhould be at the charge to pay the ſaid Proxy, with all the arrearages thereof which did incur in his time*: And ſo in the caſe of a Rent-charge, the Leſſee is chargeable, and he is to pay the Tythes, and the Compoſition-money due therefore: So that theſe Caſes ſway ſtrongly againſt the Leſſee for years, to lay the whole charge upon him, and to exempt the Leſſor. Caſe of Proxies.

But yet we muſt here diſtinguiſh and make a difference between annual repairs in ordinary things, and extraordinary repairs. For to furniſh the Defence with petty reparations, they ſhall be laid onely upon the Leſſee for years or for life; but if a new Wall, Bank or Goat, or Sewer be to be built new, and erected; or if the ancient Defences be decayed in the main Timber, or in the principal parts thereof, here as well the Leſſor as the Leſſee ſhall be put to the charge, for theſe things be not ordinary and annual charges,

charges, but do reach from the beginning of the leaſe to the top of the Inheritance: as for petty reparations they are by intendment to continue but for a ſhort time, which are likely to be ſpent during the term and leaſe; but theſe new Defences are apparently done to ſave the Inheritance: And this difference holds good correſpondency with other Caſes in our Law, as in 49 *Ed.* 3. *fol.* 1. and 3 *Eliz.* in *Dyer*, *fol.* 198. and in that Book again, *fol.* 134. and in divers other Books it is holden for Law, That if a Houſe in leaſe decay in the Groundſels, Poſt or Balk, in the great Timber, in direct wearing by tract of time, and not in default of the Leſſee; the Leſſee may take and cut up Timber growing on the Grounds leaſed to repair the ſame, and the Leſſee ſhall be at charges of workmanſhip, for the repairs are in matter of right, and doe the Leſſee good during his leaſe, and the Leſſor after the expiration thereof: And becauſe theſe great repairs extend to both their Goods, therefore they ſhall both be contributory thereto: But if a Houſe be decayed in ſplinting, thack, walling, or in ſuch petty matters, the Leſſee for years ſhall be at the ſole charge, for theſe may be ſpent in his own time.

49 Ed. 3. 3 Eliz. Dyer.

So I ſuppoſe my meaning is herein well perceived, which is, That in petty, annual and ordinary repairs, the Leſſee alone ſhall doe the ſame; but where the ſame wants in great Timber, or when a new Defence is to be built, they ſhall both be at the charge: And with this the Statute of 7 *Jac. cap.* 20. doth directly in reaſon agree withall; out of which Statute it is plainly to be obſerved, that in the great repairs, as alſo in the new building, as well the Leſſor as the Leſſee ſhall be both at the charge: Yet in the Statute of 3 *Ed.* 6. *cap.* 8. there is a clauſe in effect, *That all Lots, Scots and ſums of money hereafter to be rated by the Commiſſioners of Sewers upon the King's Lands, ſhall be gathered or levied by diſtreſs on thoſe Grounds as in caſe of other Perſons; and that all Bills of acquittance ſigned with the hand of ſuch Receiver or Collector, ſhall be a ſufficient Warrant to the Auditours and Receivers, and other the King's Officers, for allowance*

7 *Jac. c.* 20.

lowance to the Farmer or Tenant to the King's Majesty; Whereby it appeareth, that the Farmer of the King shall not be at the charge, but His Majesty; yet by the Statute 13 *Eliz.* cap. 9. it may be collected, that the Lessee for years shall be charged, but all these are to be reconciled with my said diversity. 13 *Eliz.* c. 9.

But *Heath* Justice *B. R.* in the Case of *Commins* and *Massam* was of opinion that the Commissioners of Sewers may charge the Lessor or Lessee, at their discretion, though it were for a new Defence, *March* 198.

But now it may be objected to me; *Sir, do you think it reasonable or possible for Commissioners of Sewers to take notice at the first of every private Man's Inheritance, and the several Estates which the Parties have therein, when it will scarce be possible by private search to find them out?* Num.

To this I answer, That it is not reasonable to tie the Commissioners to such difficult and obscure businesses; but it is sufficient for the Commissioners to impose or lay the rate, tax or sess on the Grounds, or on the visible Possessours thereof: and if the money so rated be demanded on the Lessee for years, or for life; or if the Goods be distrained therefore, or they be compelled to pay the same, then they may come before the Commissioners, and shew forth their lease, and make it appear, that *J. S.* hath the reversion, and as the case is, to be charged as well as himself; and upon due proof thereof made, the Commissioners upon hearing the Parties on both sides may apportion the tax on either of them, as in justice, discretion and true judgment is requisite. And so if a tax be set upon Land, the Owner may come in before the Commissioners, and make it to appear before them, that *J. D.* hath a Common, and Rent thereout; and upon proof thereof made, the Commissioners are to lay the charge accordingly: And so it shall not tie the Commissioners at the first to lay the charge upon every

every particular Person, for that were *opus infinitum & impossibile*, but to relieve the Parties upon their complaint; and this may be easily done, and it stands with the justice of these Laws so to doe: And if the Parties grieved will not complain for relief, let it be justly accounted their own folly, and no injustice of the Commissioners; for the very 6 H. 4. c. 12. Statute directs, that such as are grieved shall have relief upon their complaints, which confirms my opinion in this point.

Taxes, Rates and Assessments imposed merely by the Laws of Sewers.

I Have formerly put nine several matters to tie men to the repairs, and this, by the Laws of Sewers is the last, but not the least of them: I propose these to be by the Laws of Sewers, because they be not backed, helped, aided or assisted by Customs, Prescriptions, Common right, or by any other Rule of the Commonlaw, or by Tenure or Covenant, or any act of the party, as all the rest be, but are onely composed, made, ordered and directed by the sole power and authority of these Laws of Sewers: and these are such as fall out of all the former rules, and therefore *in nove cessa novum remedium est adhibendum*: But yet before I enter into my own works, I will set down and declare the opinions delivered in *Rook's* and *Keighley's* Cases, which seemed one of them opposite to the other: for in *Rook's* Case it is said, *That if one be bound in respect of his Lands to repair a Wall or Bank by Tenure, Prescription or otherwise, that yet the Commissioners of Sewers could not assess the said party alone to repair the same; and said, that the Commissioners were not tied to the Rules of Prescription, Tenure, Custome or otherwise, but ought to assess all the Level to do the same, which are to have good thereby*: But this being mistaken, is very justly and discreetly altered in the said Case of *Keighley* by the Authour himself; for how could it be presumed, that the learned makers of this worthy Law would have stricken down

Rook's Case.

Keighley's Case.

down at one blow ſo many thouſand Preſcriptions, Cuſtoms, Tenures, Covenants and Uſes, as be within this Realm, which be tied and bound to doe and make the repairs in this kind, ſome in conſideration of Houſes and Land, others for yearly Rents, and for other cauſes, which to have ſet at liberty, and to have impoſed the charge on the Levellers, would have wrought and brought a wondrous innovation, change and alteration in theſe works; all which by this expoſition are freed and ſaved: But yet there be certain Caſes which of meer neceſſity lay the charge upon the Level, which are as follows:

The charge upon the Level.

1. FIRST, If any grounds were heretofore by Cuſtome, Preſcription, Tenure or otherwiſe obliged and bound to repair any Wall, Bank, River, Sewer, Goat, Sluce, Jetty, or other Defence, which grounds ſo charged have been of late devoured and overflown by the Sea, and ſo remain; The Commiſſioners of Sewers are in that Caſe tied to lay the charge now upon the Level, which ſtand in danger of taking hurt by the not making the repairs, or which are to receive good by the doing thereof.

2. Secondly, Alſo if *A. B.* be bound by the Tenure of his Land to repair a Bridge, Calcey or Bank, and he dieth without Heirs, whereby the Land eſcheateth to the Lord of the Fee, in this Caſe the Tenure is ended, and the chief Lord is not bound to the repairs, and therefore now the charge muſt lie on the Level, and ſo is the Law if this Tenure had been in other ſort extinguiſhed.

3. Thirdly, Where no perſons or grounds can be known, which ought to make the repairs by Tenure, Preſcription, Cuſtome, Covenant or otherwiſe, then the Commiſſioners of Sewers are to lay the charge on the Level.

4. Fourthly, If *John à Stile* be chargeable to make the repairs, and be not able to doe the ſame, here the Level are to be charged to aſſiſt him therein, as appears in *Keighley's* Caſe. *Keighley's Caſe.*

5. Fifthly, If *J. S.* by reason of his Lands or otherwise be tied to repair the Sea Bank, but the hazard is so apparent dangerous to the Countrey, that *J. S.* in all likelihood cannot repair the same, and so the Countrey might be in danger to be overflown e'er *J. S.* alone could do it, here also the Countrey on that Level are to be rated and taxed towards the same: *Keighley's* Case.

And so *Roll* in the Case of the Inhabitants of *Outwell, &c.* if it be to prevent a present and publick danger, *Style* 192.

6. Sixthly, If the Sea at the Spring-tides, or at extraordinary casual swelling Tides or Floods, have broke down the fences, and overthrown the Banks, and drowned the Countrey without any default in the party who was tied to have repaited the same; the Level shall in this Case make up the breach, for things which happen extraordinarily by the Sea or great Waters, which neither policy of man could prevent, nor industry or force could resist, are counted inevitable and undefenceable: and so is the Law in the Case of Lessee for years or for life, if they suffer by neglect their Banks or Walls to be broken down, and their grounds surrounded, they be punishable in an Action of Waste; But if those grounds by the extraordinary rage and violence of the Sea or Waters be born down, and their grounds surrounded thereby, they are in this case freed from all Wastes; and in proof thereof the Case in 28 and 29 *H.* 8. *Dyer fol.* 33 is much to this purpose, where one made a Lease for years of grounds to *J. S.* lying near the River of *Ex*, and the Lessee covenanted to sustain and repair the Banks of the River to preserve the Meadow from surrounder on pain of ten pounds; yet after an extraordinary flood, the Banks were broken down, and the Meadows were surrounded, and it was there holden to be no breach of Covenant, and that he should be excused from the penalty: but yet he must make and repair the Banks in convenient time.

28 *H.* 8. *Dyer.*

Note,

Nota, this was in the Caſe of a freſh River, whereby in this Caſe the Law muſt lay the charge on the Level, if any danger be likely to enſue by the protracting of time.

In an Action of Waſte brought in *C. B.* againſt the Leſſee, for ſuffering the Sea-wall adjoining to his Land to be ruinous, *per que per fluxum & refluxum Maris, le terre fuit ſurround*, *Dyer*, Chief Juſtice, held, that though the Leſſee ſhall be excuſed where the Wall is born down by the ſudden violence of the Sea, and the Land ſurrounded thereby, and the ſame could not be prevented; yet if there be a ſmall breach in the Sea-bank or Wall, and the Leſſee doth not repair it, but ſuffers it to continue, ſo that afterwards the violence of the Sea, breaks the reſt of the Wall, and ſurrounds the Land, that in that caſe it is waſte in the leſſee, for it was his own fault, that he did not amend it at the beginning, *Moor* 62, 63. ſee the ſame difference taken by *Dyer* and *Welch* in another caſe, *Moor* 73.

But this difference was not allowed for the Banks of the River of *Trent*, 6 *Eliz.* in the Caſe of *Griffith*, who brought an Action of Waſte, for that the Leſſee ſuffered the Banks of the ſaid River, which ran by the Lands to be unrepaired, whereby the Water brake the Banks, and ſurrounded the Lands; For there it was ſaid by all the Judges, that the *Trent* is not ſo violent, but that the Leſſee by his policy and induſtry, might

have preſerved the Banks, and cauſed the water to have run within its limits, *Moor* 69. ſo that it ſeems in ſuch caſe, where there is neither Sea, nor any extraordinary high ſwelling-waters, but a River of an ordinary and gentle current, ſuch excuſe of the Leſſee is not to be received, but if there be any irruption and ſurrounding, it is waſte.

7. Seventhly, if one do hold his Land by the yearly payment of Ten Shillings towards the repair of a Wall, if this money will not defray the charge, the reſt muſt be laid on the Level.

8. Eightbly, If a new Wall or Bank be to be erected, or a new Sewer, Trench or River to be caſt, or Sluce or new Goat to be built, in theſe caſes the Commiſſioners muſt lay the charge on the Level which are to take benefit thereby, as well for new building thereof, as with the maintaining of them: for in the Caſe of new Defences there can be no Preſcription, Cuſtome or Tenure bound to doe the ſame.

9. And laſtly, In caſe there be a great Port in the Countrey, by the which the whole Countrey hath benefit; for the Ports and Havens, as hath been ſaid, be *Oſtia & januæ Regni*, and are the Defences to the whole Countrey *tempore pacis & tempore belli*, and are thoſe places, by means whereof the upland Countreys be made partakers of the Sea Commodities; therefore in my opinion, the extraordinary repairs of theſe be not altogether tied to the Level, as in other Caſes, nor to preſcription or Cuſtome of repairing, which extends but to ordinary defects, but upon great and urgent neceſſities, for the ſafety of the Port, upon the welfare whereof the ſafety of the Countrey doth depend, the whole Countrey are obliged and bound to contribute towards the repairs, for theſe reaſons following:

First,

First, for that in time of peace it is the Gate which openeth it self to let in from Foreign parts the Ships and Barques, which bring hither to this Island such Merchandizes, Wares and Commodities, both for our profit and pleasure as we have need to use. 1.

Secondly, At these Ports we ship out to Foreign Nations our excess of Corn, Cloth, Skins, Lead and other Wares, wherewithall we do abound, and receive in truck therefore other things more usefull and necessary for us. 2.

Thirdly, In time of War we have shipping here for our Souldiers, and means at the easiest charge to transport them to such Places as the King and Council shall direct. 3.

Fourthly, In those Ports are commonly great Havens, which are the chief receptacles of all our fresh Waters, into which the Waters which drown the grounds of the countries adjoining are conveyed. 4.

And lastly, it appears by divers Authors, that a Countrey well furnished with Ports and Havens, is not more strengthned than honoured thereby; and if it be as lawfull as convenient to put a case of Chronicle Law upon it, in the 28th year *Eliz.* in *Holingshead's* Chronicles, it appeareth what great care the Queen and the Lords of the Privy Council, and the Knights and Gentlemen of *Kent* took for the repairing of *Dover* Haven, what preparation was made for it, what moneys Levied, and how forward all the Countrey was to effect that work, may be a Spectacle to others for to lend their helping hands to the maintaining of such worthy Works, being of all other the most Honorable to our Nation, and the most usefull to the inriching thereof; for which causes in my opinion, because the Mountains as well as the Valleys have both *Salvationem defensionem & commodum* thereby, therefore in time of need the one as well as the other should be charged by the power of this Commission, to contribute to the extraordinary repairing of the same. 5. *Hol. Cron.*

A Sea-

A Sea-wall was overthrown by a ſudden and inevitable Tempeſt; one within the Level ſubject to be drowned, diſburſed all the money for the building of a new Wall: Afterwards the Commiſſioners taxed every man within the Level for the repaying of the ſum diſburſed, with his damages, *viz.* intereſt for his money, and this matter being diſcloſed upon a return to a *Certiorari*, *Brampton*, Ch. Juſt. and *Heath*, Juſt. *B. R.* were of opinion that this charge was legally impoſed, as well for the damages, as the principal money; And that the Commiſſioners having juriſdiction of the principal, have juriſdiction likewiſe of the damages, which are the acceſſory: For who elſe would hereafter diſburſe all the money in any imminent danger and neceſſity, if he ſhould not be allowed uſe for his money? *March* 198, 199, 200, 201.

I have now proceeded in this point of Seſs ſo far, that I take it, I may Juſtly here make my full period of this days exerciſe; and I have taken up the more time herein, becauſe thereupon a main part and ſtrength of this Law conſiſts: And therefore I will now apply my ſelf to my concluſion, in the which I have already proceeded ſo far, that I have made it in ſome ſort to appear, that ſome of the Seſſes in particular are not well impoſed, as the Leſſee in caſe of the new defences was not alone chargeable, for that he in the reverſion was to contribute thereto, and that no impoſition ought to have been laid upon the Parſon for his Tythes, but the owner of the Soil was to be charged for all; ſo that theſe two be already ruled for me: But yet if any of the Seſſes ſhould be good, then I ſhould fail in my concluſion;

I ſhall

I ſhall therefore ſet forth in few words, that all the Seſſes are void.

And the cauſe is this, That the draining of the ſuperfluous Waters in *S.* appeareth by my Caſe to be onely commodious for *S.* and that *D.* the other Town had no good thereby: And it appears alſo, that by the repairing of the ancient Sewer in *D.* that Town onely had benefit thereby, therefore to aſſeſs *S.* to repair in *D.* and *D.* to contribute to *S.* where in thoſe Caſes there could be no benefit, is directly againſt the letter and ſenſe of theſe Laws; but herein either of them ought to have been at charge with that, by the which it took benefit, and that not otherwiſe; and therefore the mixture marred all the matter: And ſo upon all this I conclude my Argument as I did my Caſe, that the new Bank, new River, and old Sewer were well decreed, but that the aſſeſs is void *in toto & in qualibet parte.*

Finis Secundæ Lecturæ.

Lectura

Lectura Tertia.

IN my two preceding Cases, the main body of this great Law were contrived, and therefore I took a greater and larger compass in my Arguments therein, than otherwise I would have done; and I am now come to the execution of these Laws, wherein the life and livelihood of all Laws consist: And it may well be said of execution, as Mr. *Plowden* in *Zouch* and *Stowell's* Case, in his *Commentaries*, *fol.* 358. saith of a fine, that it is *finis fructus exitus & effectus Legis*; so is execution the fruit, issue and end of the Law, and without it nothing is effectual, and till it come nothing is material; for to begin a Suit and stay at the declaration, were a fruitless enterprise; and to proceed on to judgment, and to go no farther, were like a Traveller which undertook a journey, and returns or sits down without farther moving, before he came at the end of his intended progress. *Plow. Com.*

Law, as *Cicero* saith, is but *mutus Magistratus*, the Magistrate is *Lex loquens*; but I shall add something, which upon the matter is the sum of all things, that is, That *executio est Lex agens*: And because I esteem the time to be almost lost or misspent which is prologued out in preambles, I will therefore now briefly divide this part of this Statute into these insuing heads: *Cicero.*

I. Either in punishing the { Imprisonment, / body and person of the / Delinquent with { Fine, or / Amerciament.

2. Or in doing execution upon the Offender's Goods { By diſtreſs, or by the Abſolute ſale thereof.

3. Or otherwiſe in extending upon the Real Eſtate { By charging the Land in perpetuity, or temporarily; or by the abſolute ſale thereof.

The true and due execution of all theſe in a juſt, legal, equal and qualified decree, requireth of all other parts of Law this greateſt and trueſt diſcretion, conſideration, wiſedom and judgment of the Commiſſioners: And I take it, it may ſtand as a ground infallible, that there be as many degrees of puniſhment, as there be offences; it behooveth therefore the Commiſſioners to be circumſpect, that they apply to every offence his due puniſhment; for it is injuſtice to puniſh the offence committed in a wrong degree; to pronounce a Traitor's judgment upon a Felon, or a Felon's judgment upon a Traitor, in grand miſpriſion; to impriſon the Body, or to fine the perſon, where an Amerciament is onely due, is not onely injuſtice in the Commiſſioners, but thereby alſo their diſcretions are to be drawn in queſtion and cenſured.

And ſeeing the Statute doth ſo much lie upon diſcretion of the Commiſſioners, as in many parts of this Law it is mentioned; it ſeemeth the Parliament did give them to underſtand, That ſuch as were to meddle in thoſe affairs, ſhould be both diſcreet and wiſe, and ſhould ſtrive to become learned in thoſe affairs.

And therefore for the better furniſhing of them with the true underſtanding of the ſaid parts of this Statute, I have framed a Caſe thereupon, which doth give juſt occaſion to treat fully of them all.

The third Case.

A. Gave the Office of a Ranger of a Forest, to which a Manor is belonging to *J. S. & Abnepti*, and to the heirs, males and females, of their Bodies in Frank-marriage, and dieth. *B.* and *C.* their legitimate Son and Daughter, and *D.* their Bastard Daughter enter, and dieth in seisin, and *E.* her Daughter enter. The Commissioners of Sewers at a Court make a Law, That a Goat shall be repaired, and assess severally *A. B. C.* and *E.* to doe it, upon surmise that they all had benefit. *B.* and *C.* refuse to obey, for which *B.* is imprisoned, and *C.* is fined. *A.* and *E.* tender pleas of discharge, which are refused, and they are severally amerced, and a Law made, that *A.* should be distrained, and for non-payment the distress to be sold, without allowance of Replevin, and the interest of *E.* should be also sold, because she hath nothing to be distrained by. I conclude, the Commissioners of Sewers have done due Justice upon the Offenders in every part of this Law.

Argumentum Lectoris.

The passages of this Case are both at the Commonlaw and by this Statute: The Commonlaw is the means, but the Statute is the matter I must insist upon: But seeing the Statute Law can receive no due construction, but by the Rules of the Commonlaw, I have therefore made a harmonial composition of them both in my Case, and I do distinguish and branch out my Case into these ensuing points.

Points at the Commonlaw.

Imprimis, Whether this Office may be intailed or not? 1.

Secondly, Whether it be an ordinary Intail, or a Frank-marriage? 2.

Thirdly, Whether the Bastard be inheritable to this Estate, or not? 3.

Points upon the Statute.

1. First, Whether the Commissioners have a Court, or onely the strength of the Commission without a Court?

2. Secondly, Whether Commissioners of Sewers have power to imprison and to fine? if so, then whether they have well behaved themselves in this Case, or not?

3. Thirdly, Whether this Law doth admit of any pleas, and especially of pleas of discharge?

4. Fourthly, Whether the Law made touching the distress be well made, because it seemeth *prima facie* to oppose a main point of the Commonlaw, in denying of Replevins?

5. Fifthly and lastly, If the Law made for sale of Lands or Tenements in Tail be warranted by this Statute, or not?

These be the materials of this Case, wherein you may perceive by the beginning, what you are to expect in the sequel and conclusion of my argument.

These Points upon the Statute are of great consequence and importance, and tend much into the powers of these Laws: In the handling whereof, according to my wonted fashion, I intend to maintain the Affirmatives of my Case.

First Point:

I did not intend it a point of any importance in my Case, Whether Land might belong to an Office; for that in the 1 H. 7. *fol.* 26. in Sir *Richard Croft's* Case, it is resolved it might: For there Land did belong to the Office of a Forester, and might belong to the Office of the Warden of the Fleet, and also to a Corody which was no Office, and these as well as to a spiritual Office, Parson, Vicar, Prebend or such like.

1 H. 7.

And yet it hath been held, that Land may be appendant to offices of Inheritance, but not to offices for life; for then the Freehold would upon the death of every Officer be in obeyance: *Dyer* 6. *E.* 6. 71. *Davis Rep. fol.* 34.

Dyer 6. E. 6. 71. Davis Rep. fol. 34.

But whether or no these Lands might be parted from the Office by alienation, I thought that an argumentable point: in 6 H. 8. *Dyer, f.* 2. *Empson's* Case it is said, if the King ere- 6 H. 8. Dyer 2.
ate a Duke, and grant to him an annuity to maintain his Dignity, that annuity was so incident to his Dignity as it could not be sever'd therefrom; and so of Lands belonging to a Parson, Vicar, Bishop or such like, because they were given to the maintenance of them in their places, and therefore if these were severed, they might be recontinued again to their Successors.

And in the Case of Sir *Henry Nevil* in *Plo. Com.* an Of- Plo. Com.
fice of a Parker was granted to two, and Annuity for the exercise of it; and it is there resolved, that the Annuity might not be severed from the Office: and so it might be said in my Case, That the Manor which belongs to the Office was at the first laid thereto, or given therewithal for the maintenance of the Officer in his place by the Founder, and so may not be severed therefrom without his consent. And touching the intailing of the Office of the Ranger of a Forest, it is held in *Mansel's* Case in the Comment of Mr. *Plowden*, that the Office of a Bailiff or Receiver of the Rents of a Manor may be intailed.

And so it was resolved by all the Judges of *England* in *Nevil's* Case, *Co.* 7. 33. and that the office of Steward of a Manor might be likewise intailed within the Statute *de donis conditionalibus*. Nevil's Case.

So an use and a Copyhold, because these concerned and depended upon Land. But the Office of the Master of the Hawks, or the Master-ship of the Horse could not be given in Tail within the Statute of *West.* 2. *de donis conditionalibus*, nor an Annuity which chargeth the person; Yet all these may be given or granted within these intailed limitations, but yet they are no intails within that Statute.

Tam.

I am of Opinion, That the Office of a Ranger of a Forest cannot of it self be given in Tail, but having a Manor belonging to it, makes the question of more moment; For as the Office *De se* is not intailable, so the Land *per se* may be intailed: But Land in our case is not the principal, but the accessory *& accessorium sequitur suum principale*; and therefore seeing the Land follows the Office, as the shadow doth the Body, and passeth out of his own kind by the ceremony belonging to the Office, and not by the ceremony by which Land is transferred and passed, I should therefore take it, that the Estate of the Land should be such as the Office of it self might bear, which could not be intailed; yet because in the said Case of the Forester, with Land belonging to it, it is taken to be in Tail in 1 *H.* 7. aforesaid, with a remainder thereof over in Fee, I am therefore concluded to make any farther Question of it, and so I leave it as I found it, and do pass to the argument of the other Points.

1 *H.* 7.

Second Point.

The second Commonlaw Point is, Whether this gift in my Case be a Frank-marriage or another intail; I have observed in Books that there be five things incident to a gift in Frank-marriage (*viz.*)

1. First, It must be to or with a Cosin within the four degrees.
2. Secondly, The Word *Frank-marriage* must be literally expressed.
3. Thirdly, The Reversion must be left at the time of the gift in the Donor; and then there be two other things follow as consequents.
4. Fourthly, Acquital of payment of Rents and Services; But the Tenant in Frank-marriage shall doe fealty, according to *Littleton*.
5. And Fifthly, Warranty to secure the Estate.

And the want of these or any of these in the creation doth destroy that Estate in the conception.

Here

Here seem to be two Impediments in my Case to hinder this gift to take root as a Frank-marriage; It is made *absque*, which is the Cosin in the fourth degree, and the last in those gifts, whereby the gift that way cannot have his full operation, for that the first Heir of their Bodies is out of the former Privileges: But in regard I take it that a Frank-marriage doth more respect his original creation *In incepto* than the descent of the privileges to the Heirs *In suo progressu*, I take this to be no impediment to hinder this from being a gift in Frank-marriage. But here the words in the gift preceding the word *Frank-marriage* do differ much from it, for by the special limitation the Heirs Females shall inherit with the Heirs Males, *Simul & Semel* as Heirs in common; But in the Case of the Frank-marriage Heirs Males shall first inherit single, and for want of them then the Females.

I do agree the Law, that in cases where the special words of limitation may in construction be made to agree with the word, and limitation of Art contained in Frank-marriage, the gift shall be taken a Frank-marriage, as in the Case of 2 *H.* 3. *It. sess. Fitz. Mordaunt. plac.* 52. where Lands were gi- 2 *H.* 3.
ven in Frank-marriage to *R. S. cum Alicia sorore le donor ita quod post mortem dicte Alicie & puerorum suorum*, the Land should revert to the donor; and this was adjudged a gift in Frank-marriage, and the words *Ita quod* were holden of no validity; neither will the words of *Reservandum Reddendum Tenendum* or *Warrantizandum*; though they vary from the nature of a Frank-marriage, yet they shall not destroy the same as an *Habendum* may do, which is the word whose proper place is to create the Estate: and therefore if any thing come therein, which is repugnant thereunto, the same will alter the quality of the gift: And with this agreeth the Case in 43 *Ed.* 3. Title *Tail* 14. and 31. where Lands were 43 *Ed.* 3.
given to *J. S.* in Frank-marriage with *B.* the Daughter of the Donor, *Habendum* to them and their Heirs, and this was held a Fee simple, and no Frank-marriage; so in *Webbe* and *Owen* 26.
Potter's Case, *Owen* 26.

And

And the like Law is where Lands are granted in Frank-marriage, the remainder in Fee to *J. S.* and his Heirs; the Frank-marriage is defeated by the opinion in *Br.* Cases, and *Godb.* 20. And if Lands be given in Frank-marriage, the remainder to the Heirs of the Husband, by this remainder the Frank-marriage is defeated, *Moor* 643. *case* 888. And so in my Case, because there can be no reconciliation between the special words of limitation in my Case, and the Word Frank-marriage: I am therefore of Opinion, that this Gift is an Estate in Tail, according to the special limitation, and no Frank-marriage.

Godb. 20.

Moor 643.

Note, The Cases here put are of a remainder in fee-simple; For if Lands be given in Frank-marriage, the remainder to the Donees, or to a Stranger in tail, the gift in Frank-marriage stands good, notwithstanding this remainder, because the Donor hath still the reversion in fee in himself, and the Donees in Frank-marriage hold of the Donor, *Co.* 1 *Inst.* 21. *b. Godbolt* 20. *Webbe* and *Potter's* Case.

1 *Inst.* 21. *Godb.* 20.

Third Point.

Whether the Bastard shall inherit to have an Estate in tail, is the third Common-law question; for I am clear of opinion, that a Bastard cannot inherit to a gift in Frank-marriage, because Adultery and Fornication, which is the Seed of every Bastard, is opposite to marriage, and in breach of that powerfull link and knot of Matrimony, which is an Ordinance derived from the Divine Power of the Almighty: And therefore seeing marriage is the material consideration of such a gift, Bastardy the opposite can never (being out of the consideration) come within the privileges to inherit this Estate.

So

So if I give Lands to *J.* and *S.* and to the Heirs of their two Bodies lawfully begotten, their Baſtard cannot inherit to this gift, becauſe he is not heir of their two Bodies lawfully begotten; But if the Word *Lawfully* had been out of the limitation, then I ſee no reaſon but that a Baſtard may inherit to an Eſtate in tail, as to a Fee-ſimple conditional, which he might have done at the Common-law, ſeeing an Eſtate tail may be made before marriage, as expecting to be confirmed thereby; and ſo a Baſtard born before marriage is by the conſummation of a ſucceeding marriage made capable to inherit to them, if his poſſeſſion continue without diſturbance to his death: Yet in *Plow. Com. fol.* 57. in *Winbiſh* and *Tailboy's* Caſe, it is ſaid, *That if there be a Baſtard, Eigne and Mulier puiſne, and the Baſtard after the death of the Anceſtour entreth into intailed Lands, and dieth ſeized, this doth not bind the Mulier in caſe of Eſtates Tail, as it doth in an Eſtate of Fee-ſimple*: and voucheth for authority in the point, 39 *Ed.* 3. *plac. ultimo*, where the Caſe is, *That Lands were given in tail to J. S. the remainder in tail to C. and J. S. hath Iſſue by a Woman a Baſtard, and dieth ſeiſed, and then the Baſtard dieth ſeized, having Iſſue, he in the remainder may recover the Land againſt the Iſſue of the Baſtard*; affirming, *That the continuance of poſſeſſion in the Baſtard ſhall not be prejudicial to him in remainder*: To which opinion I do ſubſcribe, becauſe he in remainder is a ſtranger in bloud, and ſo cannot be concluded as the *Mulier* ſhall be; for a *Mulier* indeed is like a graft drawn out of both the blouds of Father and Mother: ſo the Baſtard is a ſlip which is derived from the ſame Stock, and had his being therefrom. *Plo. Com.* 57. 39 *Ed.* 3.

And for my own opinion, conſidering the Statute of *Weſtminſter* 2. *de Donis* doth accept of Gifts in tail made before Marriage, upon the hope and expectation of a ſucceeding Marriage to perfect the ſame, even ſo the Marriage ſucceeding to a Baſtard's birth gives him and his Iſſue a privilege in theſe Caſes of deſcent, which is denied to other Baſtards or mere Strangers. And I ſee no reaſon where-

fore that maxime and principle of Law ſhould be altered by the ſaid Statute of *Weſt.* 2. but becauſe *Mountague*'s opinion in Mr. *Plow. Com.* ſways the other way; I will therefore ſubmit this Point to men of greater judgment than my own: So that if the Law fall out for the Baſtard Iſſue, then ſhe ſhould have title to the half part belonging to the Females, and to no part belonging to the Heirs-males: And with this Concluſion I do here end my Common-law Points, and will now reſort to the handling of my Statute Points.

In the Caſe of *Blodwell verſus Edwards, Mich.* 38 & 39 *Eliz. B. R. Popham* Chief Juſtice, and other of the Judges were of opinion, that if a limitation be to ſuch iſſue of the Body of a Woman, as ſhall be reputed to be begotten by *A.* on her Body, and ſhe hath afterwards a Baſtard, who is reputed to be their Iſſue: The Baſtard can never take by ſuch a limitation: For the Law hath not any expectancy that any ſuch Perſon ſhould be, nor will give liberty or ſcope, to provide for ſuch before they be; And if he cannot take at the time of his birth, he never afterwards ſhall take; Now the Baſtard was not capable to take at the time of his birth, becauſe he could not then be reputed to be the Son of *A.* For none can gain ſuch a reputation at the inſtant time of his birth, but it muſt be gained by continuance of time, and reputation of the Countrey. The limitation alſo to one and the Iſſue of his Body, is always to be intended lawfull Iſſue; and the Law will never regard any other Iſſue, *Cro. Eliz.* 510.

Which

Which opinion directly contradicts that of our Reader, *viz.* That if Lands be given to *J.* and *S.* and to the Heirs of their two Bodies begotten, without the word (lawfully) a Baſtard may take by ſuch a limitation; And the caſe ſeems to be ſtronger againſt him, becauſe he puts in the word, Heirs. For though a Baſtard may be the Iſſue of their two Bodies, yet he cannot be the Heir of their two Bodies: Nor can the marriage of *J.* and *S.* ſubſequent to the birth of the Baſtard alter the caſe, if that in *Croke* be Law; For although what our Reader ſaith is true, that the Statute of *W.* 2. *de donis* doth accept of gifts in tail, made before marriage, upon the hope and expectation of a ſucceeding marriage to perfect the ſame, yet a Baſtard cannot perfect ſuch a gift in tail in the eye of the Law, which onely regards lawfull Iſſue.

The Sewers are a Court of Juſtice.

I Am deſirous to attribute to this Law all the honour and dignity which may in any ſort belong to it; and therefore I am unwilling to forget any thing which may materially tend to the upholding and maintaining thereof: wherein amongſt the reſt, and the chiefeſt of them all, it is, To prove the Commiſſioners of Sewers a Court of Juſtice: I know ſome Opinion hath been to the contrary, and held, That the Commiſſioners had onely the power of a Commiſſion, and not any Court; and I ſuppoſe much may be ſaid to maintain that Opinion,

1. First, Because *in expreſſis terminis* there is no Court ordained by this Statute, or by any other, and without words expreſs in the Point, they can have no Court.

2. Secondly, By preſidents in the like caſe it hath been held no Court, as in the Caſe of the City of *London*, in Sir *Edward Cook's* 8th Report, The King granted to the Major and Commonalty *Plenum & integrum ſcrutinium gubernationem & correctionem omnium & ſingularum miſteriarum*, and it was reſolved, That they had no Court in this caſe, becauſe no Court was granted to them by the Patent, as it is holden in Doctour *Bonham's* Caſe, *f.* 119. in the ſame Report, wherein the principal Caſe there put ſways the ſame way; for there the Phyſicians had power to impriſon, and to fine Offenders, yet they had not any Court thereby.

The Caſe of the City of *London.*

And ſo if a Commiſſion iſſue out of the Chancery to examine matters in a Suit there depending, and to *Oyer* and *Terminer* the ſame, yet hereby theſe Commiſſioners have not any Court; for in that caſe the Commiſſion is derived out of the proper power of the Chancery, which is the Court for that cauſe *eo inſtante* when it is in Commiſſion: And one Cauſe cannot *uno eodemque tempore* depend in ſeveral Courts; neither have the Commiſſioners upon the Statutes of Bankrupts and charitable uſes any Courts: nor the Commiſſioners in the caſe of 1 & 2 *Eliz. Dyer, fol.* 175. which had power to hear and determine the Office of the *Exigenter*, had not any Court, but onely the power of a Commiſſion: For in truth theſe are all of them rather Miniſterial than Judicial Commiſſions, and ſo a Court is not proper to them.

Yet I am of opinion, That the Commiſſioners of Sewers have an eminent Court of Record: It is true, that Courts had their beginnings in three ſorts;

1. First, By Preſcription.
2. Secondly, By Charter-grant from the Crown. And,
3. Thirdly, By Act of Parliament.

1. The Courts, Hundred and Leet began by cuſtome, and ſo did the eminent Courts of *Weſtminſter-hall.*

2. Courts

2. Courts in Corporations moſt of them took their beginnings by Charters. And,

3. The Courts of firſt Fruits and Tenths, and the Court of Wards and Liveries were erected by Act of Parliament, the one in 32, the other in 33 *H.* 8. But to bring the queſtion nearer home to our Statute of Sewers, which is but *additamentum legibus antiquis Sewerarum*, for they have been uſed from the beginning of Laws, though perhaps not known by that name: And yet before the 6 *Hen.* 6. they were known by that name, as by the peruſal of that Statute may be collected: And therefore for the cauſes and reaſons hereafter enſuing, I hold the ſame to be a Court. 32 *H.* 8. 33 *H.* 8.

1. Firſt, For that the Statute of 12 *Ed.* 4. *cap.* 7. and our very Statute of 23 *H.* 8. calls the Commiſſioners of Sewers *Juſtices*, *So Fitz. N. B.* 113. *b.* and one cannot properly be a Juſtice or a Judge but in a Court; and that in *Fitzherbert* was urged by *Brampſton*, Chief Juſtice *B. R. Paſch.* 18 *Car.* 1. in the Caſe of *Commins* and *Maſſam*, to prove they were a Court before the Statute of 23 *H.* 8. 5. *March* 201. 12 *Ed.* 4. *March* 201.

2. Secondly, Here be legal Proceedings and Proceſs: for this Statute ſaith, *That the Commiſſioners may make and direct all Writs, Preceps, Warrants, and other Commandments, to all Sheriffs, Bailiffs, and other Miniſters, &c.* And the Statute of 1 *H.* 4. *cap.* 12. hath theſe words in it (*That he that thinks himſelf grieved may purſue and he ſhall have right*) and where there be legal proceedings, and where parties grieved may come in and have remedies for the wrongs and injuries done to them, there is properly a Court of Juſtice to have them in: But in Dr. *Bonhams* Caſe the Phyſicians had no legal proceedings, and therefore parties grieved could have no remedy, which was the reaſon they had not a Court. 1 *H.* 4.

And

3. And Thirdly, The chief reason wherefore I take it that Commissioners of Sewers have a Court, is, Because the Commission of Sewers is a member of the ancient and renowned Court of *Oyer* and *Terminer*, which was and is a Court of great esteem, power and authority; and so it was needless to erect a new Court in this case; as it was needfull to erect and found the Courts of Wards and first Fruits, the first would else have remained in the Chancery, to the which primarily it did belong, and the other was a new Revenue, and wanted a Court to direct or dispose of it.

4. Fourthly, The Commissioners have a Clerk proper to themselves to register their Laws.

5. Fifthly, The Commissioners have power to make Orders and Decrees, which are Judgments in effect, and some of them cannot be reversed but by Act of Parliament.

6. And Lastly, Writs of Error have been brought to reverse Judgments given in that Court.

For all which causes I do conclude, That the Commissioners of Sewers have a Court of Record, although it be not holden *in aliquo loco certo*: So was the *King's Bench*, a Court of more Eminency than this, but *ubicunque fuerimus in Anglia*, and for express Authority in the point is *Gregory's* Case in the 6th *Report* of *Cook* Chief Justice, that the Sewers is a Court of Record.

Gregory's Case.

Herne. And this Court (by the opinion of *Herne*, *Lect. p.* 7, 8.) may sit and inquire by a Jury on the Sunday, though the same be not in Law *dies juridicus*; For judicial Acts *propter necessitatem* are good on that day; And the Sea is an Enemy not to be repelled but by this Court.

Note, All Commissions of Sewers, and all returns and proceedings thereupon are by the Statute of 23 *H.* 8. 5. to be in English, and not

in

in Latin: And ſuch ſtrictneſs is not obſerved in the forms of ſuch proceedings, as in Indictments, *Siderfin* 1. 78. *Style* 85.

Siderf. 1. 78. *Style* 85.

Neither doth there need any adjournment of the Commiſſion of Sewers, as was agreed, *Mich.* 1649. by the Court of upper Bench (then ſo called) in the Caſe of the Inhabitants of *Outwell, &c. Style* 179.

Style 179.

And although before the ſaid Statute, when the Proceedings of the Commiſſioners of Sewers were in Latin, a Writ of Error would lie thereupon: yet no Writ of Error now lieth upon any of their Proceedings, becauſe they are all in Engliſh: *March* 197, 201. *Commins verſus Maſſam*: But in that Caſe *Brampſton* then Chief Juſtice *B. R.* ſaid the Party grieved ſhould be at no loſs thereby; for he ſhall be permitted to diſcharge himſelf by Plea, as in all Caſes the Party ſhall be, where he can neither have a Writ of Error or *Audita querela*, as in 11 *H.* 7. 10. *Ib.* 201. And a *Certiorari* likewiſe ſtill lies, to remove ſuch Proceedings into the *King's Bench*: See for this *poſtea, pag.* *in Certiorari.*

March 197. 201.

11 *H.* 7. fol. 10.

Impriſonment impoſed by the Commiſſioners of Sewers.

IT is a point of high conſequence, whether Commiſſioners of Sewers have power by theſe Laws to impriſon the Body of a man for any thing touching the ſame, for that impriſonment of the Body ſeemeth to ſway ſomewhat againſt the

the grand Charter of *England*, and againſt the liberty of a
28 H. 8. Dyer. free-born Subject; and it is ſaid in *Bonham's* caſe, 28 *H.* 8, *in Dyer*, that liberty is a thing which the Law much favoreth: and I find in our Books of Law, That the Judges have been very carefull and curious in not extending words contained in Charters to the impriſonment of mens Bodies, unleſs they were expreſs in the Point; And therefore in
Clark's Caſe. *Clark's* caſe in Sir *Edward Cook's* 5th *Report*, *fol.* 64. The caſe is, That the Term was to be kept at Saint *Albans*, and the Major there and his brethren did aſſeſs every Townſman towards erecting and building of the Courts of Juſtice, and made an Order, That he which ſhould refuſe to aſſiſt and pay ſhould be Impriſoned; and one being arreſted and impriſoned, brought his Action of falſe impriſonment againſt
Mayor of St. *Albans*. the Major, who pleaded in effect, That they were incorporate by King *Ed.* 6. and had power granted to them in their Charters to make Ordinances, by reaſon whereof they made the ſaid Order, and ſo juſtified the impriſonment: But it was adjudged againſt the Major, for that by the ſaid Charter they had not any power to make an Ordinance to impriſon a man's Body, for that were againſt the grand Charter
Magn. Chart. in *Magna Charta*, *cap.* 29. *Quod nullus liber homo impriſonetur niſi per legem terræ*: But by that Book they might have inflicted a penalty, and diſtrained, or brought an Action of
Dr. Bonham's Caſe. Debt for it. In Doctor *Bonham's* caſe in the 8th *Report*, King *H.* 8. incorporated the Phyſicians of *London*, and gave them power by Charter to examine the Imperites, and to find out the defects, *Et pro debitis ſuis in non bene exequendo faciendo & utendo illos per punitionem eorum delinquentium per fines amerciamentum & impriſonamentum corporum ſuorum*; hereby it appears, that by the King's Letters Patents they had power to impriſon the Body; but I find their
2 Eliz. Dyer 175. Charters confirmed by Act of Parliament: Yet in 2 *Eliz.* *Dyer fol.* 175. the caſe is, *That the Queen did award a Commiſſion directed to certain Commiſſioners, to Hear and Determine the controverſies betwixt* Scrogs *and* Colſhill *touching the Office of the* Exigenter, *and that if* Scrogs *ſhould refuſe*

to

to obey to make answer before them, they should commit him to Prison; but the validity of this last Commission I much doubt of. I am of Opinion, That the Commissioners of Bankrupts and charitable uses, have no power to commit any man; but if any abuse or misdemeanor be committed in contempt or derogation of their Authorities, they may make Certificate thereof into the Chancery, and refer the punishment thereof to the will and discretion of the Lord Chancelor or Lord Keeper for the time being.

In *Godfrey's* Case in the 11th *Report and Roll* 1. 73, *&c.* there is a Discourse what Courts have power to imprison, and which not, and there it is said, Some Courts may Fine, but not imprison, as the Courts Leet and Sheriff's turn; some others could neither fine nor imprison, as Courts Baron and County Courts; and some could neither fine, imprison nor amerce, as Ecclesiastical Courts; And some may imprison and not fine, as chief Constables at their Petty Sessions for an affray done in disturbance of them; And other Courts there were which might fine, imprison and amerce, as the eminent Courts of *Westminster*. *Godfrey's Case.*

So that imprisonment is not incident to every Court, nor to every offence; Yet I am of Opinion that the Commissioners of Sewers may imprison the Body, for it is not onely a Court of Record, but is authorized by Act of Parliament; and I suppose that there be words in the Commission and Statute which will bear this construction, which are as follow, *viz. And all such as ye shall find negligent, gainsaying or rebelling in the works, reparation or reformation of the premisses, or negligent in the due execution of the Commission, That ye compell them by distress, fines and amerciaments, and by other Punishments, ways or means, &c.* Which words are strong, and large enough to authorize the Commissioners of Sewers upon just cause to imprison the Body; But here they are to be carefull, and not to think that they may imprison, fine or amerce in any case, because the words be generally put together: But this construction must be thereof made, That they may imprison where imprisonment is due,

due, and fine in cases fineable, and amerce in cases amerciable, and distrain where a distress properly lieth by the Rules of Law; and they may not imprison, where by the Laws imprisonment is not due, but every one of the said punishments is to be used in its proper kind; for these words promiscuously put together, must be ordered by a just and legal construction, according to the Rules of Law and Reason.

And I have known the words of a Statute generally and promiscuously put together, have been marshalled according to their distributive operations, as the Statute of 1 Ri. 3. which is, *That all Feoffments, Gifts, Grants, Releases and Confirmations of Land made by* Cestuy que use *should be good.* Yet though these words were generally put together, notwithstanding the wise and discreet Sages and Expositors of our Laws have so Marshalled the words of this Statute, that they made construction thereof according to the Rules and Reasons of the Law, That this, That *Cestuy que use* in Possession might make a Feoffment; and that *Cestuy que use* in Reversion or Remainder might grant the Land, and *Cestuy que use* of a discontinued Estate might release or confirm; and yet the words of this Statute were general, howsoever Reason must be the Expositor, that every thing be done in due form of Law, and not in preposterous manner.

1 Ri. 3.

And these matters being thus passed over, I shall endeavour my self to declare in what Cases Commissioners of Sewers may imprison, fine and amerce, and where not.

Imprisonment, fine and amerciament.

Fines.

If one give evil language to Commissioners in Court, or disturb the peace there, or hinder the business of the Court in a Tumultuous fashion, he may be by them Fined or com-

committed to Prison, or both, at the discretion of the Commissioners; for by 34 *H.* 6. *fol.* 24. in every case when a man is fined, he may be imprisoned; and by 19 *Hen.* 6. *fol.* 67. in every case where one is imprisoned he may be fined; and our Law in express words gives the Commissioners power to set fines: and then by the opinion of the said Books *ex consequenti* they may imprison. 34 *H.* 6. 19 *H.* 6.

But in all Cases where the Commissioners of Sewers impose a fine upon a Man, the same ought to be reasonable; and if it be excessive, a *Certiorari* may be granted by the Court of *King's Bench*, and the Judges there may moderate the fine: By *Brampston*, Chief Justice, *B. R.* 18 *Car.* 1. *March* 202.

If one oppose against a Law of Sewers not legally in questioning the same, but refractary contemning thereof, or by disswading persons assessed not to pay such, or not to obey the Law, I am of opinion that a person is both fineable and imprisonable; and if this be done *in facie Curiæ*, it aggravates the contempt; and this is the Rebelling which this Statute speaketh of.

If one do refuse to obey the Decree, Rule or Order of the Court, especially if it be done in affront of the Commissioners, when they be in execution of their Commission, This is a contempt, and he is to be imprisoned for such his disobedience, and this agreeth with 37 *Hen.* 6. *fol.* 14. 37 *H.* 6.

There is no question but a man may be fined by the Court of Sewers for not obeying their Decree, Rule or Order: See *Brusler's* Case, *Style* 445. where one was fined by them for not obeying their Orders, after a *Certiorari* was delivered to them to remove the Orders, made against the Party. But it being shewed to the Court of *Style* 445.

King's Bench that the fine ſet was for diſobeying a new Order of theirs made againſt the Party, after the *Certiorari* was returned, and not for diſobeying the Orders removed by the *Certiorari*, and ſo no contempt to the Court: An Attachment againſt the Commiſſioners of Sewers was decreed; and *Roll* ſaid, that they might proceed upon the Commiſſion of Sewers, notwithſtanding the *Certiorari*, for the *Certiorari* doth not remove the Commiſſion.

But for a bare diſobedience to their Orders, it ſeems they cannot impriſon. For in the Caſe of the Inhabitants of *Oldberry verſus Stafford*, *Trin.* 15 *Car.* 2. where the Commiſſioners of Sewers had made an Order for a Miller to repair the Floudgates, and if he broke the ſaid Order, or refuſed to obſerve it, that then he ſhould be impriſoned, it was reſolved by the Court of *King's Bench*, that the Order was illegal. For although the Commiſſioners of Sewers being a Court of Record, may impriſon a man for a contempt committed towards them, yet that ſhall be intended onely of a contempt committed in their preſence, and not barely in diſobeying their Order, *Siderfin* 1. 145.

Siderf. 1. 145.

In *Termino Paſche* 12 *Jac.* in the King's Bench, the caſe there was in debate between *Hetley* and *Carter*, where certain Commiſſioners of Sewers in the Counties of *Huntington* and *Northampton* made a Law, That certain Townſhips in thoſe Counties were aſſeſſed to a work of Sewers, and one Town.

12 Jac.

Town was rated to five pounds; and becauſe the ſame was not paid, the Commiſſioners cauſed a Warrant to be directed to the ſaid *Carier*, to diſtrain for it, and he diſtrained the Cattle of *Hetley* one of the Inhabitants, and *Hetley* brought an Action of Treſpaſs in the Kings Bench againſt *Carier* and arreſted him thereupon, and upon complaint made to Sir *Anthony Mildmay*, and Sir *John Boyer* Knights, and other the Commiſſioners of Sewers, they cauſed *Hetley* to be attached by their Warrant, and committed him till he ſhould releaſe his Action brought againſt *Carier*, and untill he ſhould be delivered out of the Priſon by Warrant to be granted by them: But afterwards *Hetley* procured a *Habeas corpus cum cauſa* out of the Kings Bench, and was removed, where all the ſaid matter appeared; and thereupon Attachments were awarded againſt the ſaid Commiſſioners; and Sir *John Boyer* appearing, was by *Cook* chief Juſtice, *Crook*, *Dodderidg* and *Houghton*, Juſtices, committed to the King's Bench Priſon, and was fined two hundred pounds; but was after delivered *Ex favore regis ſed non ex Rigore Legis.*

And Sir *Anthony Mildmay* not appearing in the *King's Bench* upon warning given him, an Indictment of *Præmunire* upon the Statute of 27 *E.* 3. *cap.* 1. was exhibited againſt him for this offence, and he had judgment (as it ſeems) thereupon; But he afterwards obtained the King's pardon, which was allowed in Court: See the Caſe at large in *Bulſtrode* 2. 197, 198, 199, 299, 300. and *Cro. Hil.* 11 *Jac.* 336. 27 E. 3. 1.

Bulſtrode 2. 197, &c. *Cro. Jac.* 336.

And in my opinion, The ſaid Commiſſioners in this caſe in making a Warrant to attach *Hetley*, and in impriſoning of him for the ſaid cauſes did exceedingly err, and the rather, becauſe they took upon them to overrule the Juſtices of the King's Bench, being of a higher and greater authority

authority than they were of; But this is no president to impeach the power of the Commissioners of Sewers for committing persons offending their authorities to Prison, if their proceedings therein be conformant to the Laws of this Realm; but they were punished in this case, not for executing their power, but for exceeding their limits, and the bounds of their Commission.

If a Collector, or Expenditor, or other Officers of Sewers have been negligent in the execution of his Office and place, he is fineable therefore, though his offence be but neglect, because he was an Officer, and was also sworn to execute the same duly.

But I take it, a neglect in another ordinary person is not to be punished.

And if one be rated to pay towards repairs, and he neglect to pay the same at the days and times appointed, he is not fineable therefore, but is to be amerced in this Case.

If a Collector or Officer of Sewers do distrain a man, or doe any other Act contrary to an Inhibition of Sewers to him directed by the Commissioners of Sewers, he may be fined and imprisoned *& simile factum fuit* in 7 *Hen.* 4. *fol.* 33. 7 H. 4.

If a Purpresture be committed in the King's streams, as in fixing Piles and Stakes therein, or in stopping, straitning or diverting the course of the Waters from their ancient chanels or courses, these offences being presented, the offenders are finable therefore, if in the Presentment they be found to be done *vi & armis*, or be presented by the name of Purprestures; for by 19 *H.* 6. *fol.* 8. if the offence be done with force, and so presented, then the Offender is fineable, but otherwise it is if the offence be not found, but omitted, for then an amerciament is onely due. And it is said in *Dyer* 7 *Eliz. fol.* 240. *That for a Purpresture one is fineable*, and a Purpresture may be committed in *aquis Regis* as well as in *viis Regis*, by the opinion of *Glanvil*. And in *Keleway's Report*, *fol.* 141. 19 H. 6. 7 Eliz. f. 240. Keleway 141.

And

And a Purpreſture is taken to be an offence done to the King immediately, or to his Poſſeſſions; But if the like offence be done to a Subject or to his Lands, it is termed a *Nuſance*. Purpreſture. *Nuſans.*

The Abbat of *Melleſont* was fined for erecting a Were in the Royal River of *Boyne* in *Ireland*, which is expreſſed in the *Iriſh Reports* in the Caſe of the Royal Piſcary of the Ban in *Ireland*, and this was a Purpreſture.

If one do refuſe to accept an Office of Sewers, being thereto duly elected by the Commiſſioners, he is fineable therefore, for in *Greſly's* Caſe, 8th *Report*, One being elected and choſen Conſtable, did refuſe to take the Office, and he was fined. *Greſly's* Caſe.

And if an Officer do miſdemean himſelf in his Office, he is fineable, for in 10 *H. 6. fol. 6.* A Tythingman did refuſe to make preſentment, being thereto required, and he was fined therefore. So in caſe of the Sewers, if one of the Jury, or which is a Surveyor, refuſe to make preſentment when he is required by the Commiſſioners, he is to be fined. So if a Juror depart after he is ſworn on the Jury, or before he be ſworn, after his appearance be recorded, he is to be fined; And if an Expenditor or Collector, Officers of Sewers, be required by the Court to accompt for the moneys received and laid out by them, and they refuſe, they may be puniſhed by fines. 10 *H. 6.*

And if the Sheriff upon Writ or Warrant directed to him to return a Jury before the Commiſſioners, make no return thereof, nor doth not attend when he is required, he is to be fined by the Commiſſioners.

Alſo an Officer of this Court is fineable for falſities done by him in his Office, for theſe are a violation of his Oath, and is a breach of that truſt which the Court repoſed in him at his election and entrance into his Office, and therefore the offence is greater in him than in another man.

I have learned in Books that a Fine hath theſe qualities with it:

First,

1. First, The Party in that case is imprisonable.

2. Secondly, The cause for which it is imposed is not traversable, being merely the Act of the Court; but if it be imposed upon a presentment found by Jury, then the cause is traversable.

3. Thirdly, All fines ought to be assessed, abated or increased in *Plena curia*, and not elsewhere.

4. Fourthly, Every fine ought to be reasonable.

And therefore I shall put the Commissioners of Sewers in mind as the Statute of 34 *Ed.* 3. *cap.* 1. did the Justices of Peace, that those fines that they should impose for any offence coming before them should be reasonable, having respect to the quantity and quality of the offence, for *Excessus in re qualibet jure reprobatur communi.*

34 *Ed.* 3.

But because in *Godfry's* Case it is said, that *Commitment of the Body to prison is incident to a fine, as by a* Capias pro fine *also may be collected*; Yet I hold it questionable, whether the fine shall precede the commitment, or the commitment the fine. But for my own opinion, I hold that this lieth much in the discretion of the Justices, and I find cases and presidents both ways; for in 41 *Assiz. plac.* 12. an Officer was imprisoned *quousque finem fecerit*, where the imprisonment preceded the fine: and with this agreeth 7 *H.* 6. *fol.* 25. and in 33 *H.* 6. *fol.* 21. one was fined, and after imprisoned for it, and there the fine did precede the imprisonment.

41 *Assiz. pl.* 12.

7 *H.* 6.

33 *H.* 6.

But upon all these I take the Law to be, that if one be fined, and this fine may be levied by the Justices, as Justices of the Peace may doe (but not Justices of Sewers) there the imprisonment may be *quousque finem fecit*, because the fine is leviable by them: But the Law is not so of Commissioners of Sewers, because they have no power to levy but to extreat the fines into the King's Exchequer. Howsoever one before them may be both imprisoned and fined *Diversis tamen respectibus*, The one for the wrong done, the other for the contempt or disobedience to the Court; As for example, if one refuse to be a Collectour, he is fineable to the King, because hereby the Commonweal is without

out an Officer; and he may alſo be impriſoned for diſobeying the Juſtice's command; and yet in my opinion it lieth much, if not altogether in the diſcretion of the Commiſſioners to impoſe or inflict both the ſaid puniſhments, or one of them, at their pleaſures, being not therein preciſely limited by this Statute.

Amerciaments.

AMerciaments be not ſo grievous as Fines be, for they be derived of the word *Miſericordia*, which ſignifieth moderation and mercy; and to that end was the Writ in the Regiſter *moderata miſericordia* deviſed, where one is outragiouſly amerced he might be relieved by ſuing forth that Writ, which Writ and the Law in that caſe is grounded upon the grand Charter, *cap.* 14. *Quod nullus liber homo amercietur niſi ſecundum quantitatem delicti*: And that none of the ſaid amerciaments be impoſed *ſed per Juramentum legalium hominum de vicineto.* *Magna Chart.*

Glanvil in his Book ſaith, *Eſt autem miſericordia Domini Regis qua quis per Juramentum legalium hominum de vicineto eatenus amerciand' eſt*: And *Fleta*, *lib.* 1. *cap.* 48. ſaith, *Quod liber homo non amercietur niſi per ſacramentum parium ſuorum.* And with theſe agreeth *Bracton*, *lib.* 3. *cap.* 1. and *Fitz. Nat. Bre. fol.* 76. and if the Steward ſet an amerciament upon a man on his own head it is void. *Glanvil.* *Fleta.* *Bracton.* *Fitz. N. B.*

By which authorities it plainly appeareth, that amerciaments are to be impoſed by a Jury, or by the Oaths of good and lawfull men; and therefore I have heretofore much marvelled, when ſometimes I have ſeen Juſtices of Sewers take upon them to ſet down amerciaments, without aſſiſtance of the Jury, which act of theirs was directly againſt the ſaid great Charter of *England*, and contrary to the ſaid authorities of Law.

So that there is a difference between the impoſing of fines which are done by the Juſtices, and amerciaments which be by Jury, or otherwiſe, *per ſacramentum pariũ*:

So is there great diversity between the offences of the one kind, and the other; For if one do suffer a Wall, Bank, or other work of Sewers to fall into decay for want of repairing, which he was bound to maintain by Frontage, Tenure, Custome or Covenant, he is in this case to be amerced therefore: And so if one be bound by any of the said ties to repair a Bridge, Calcey, Goat, Getty, Sluce, or to cleanse a River, if the same by his neglect be left undone or unrepaired, he is therefore amerceable. So if one be presented for casting Dirt, Sand, Ballast, or other annoyance into the Rivers or Streams, or for digging down the Banks, or for pulling down the Walls thereof; if the presentment do not expres the same to be done with force, or therein be wanting the word *Purpresture*, the Party presented is then but amerceable therefore: So when one is tied to cleanse the Rivers for passage of Boats and Ballangers, or for the draining of the waters, if he suffer Sandbeds to lie and choak up the Chanel, he is amerceable, and not fineable therefore; for no permission, sufferance, neglect or nonfeasans can be found to be by force, because they consist not *in Agendo, & sic in similibus casibus*; Yet some Cases following fall out of these Rules *prout sequuntur*. As if the violence of waters was so great, either by breaking in of the Sea in an extraordinary manner, or by a sudden floud or inundation of fresh waters after a rain, that thereby the Defences are broken down, or caused Sandbeds or other Nusances to be, these being presented, no man is amerceable therefore, because the same could not have been prevented by policy, nor resisted by strength.

42 lib. Assiz. In 42 *lib. Assiz. plac.* 15. a Presentment was, *That* J. S. *had suffered trees to grow into the water, and lay in the Stream, by reason whereof ships were hindred in their passage; and there was a Writ awarded directed to the Sheriff to remove the Nusans*; but *Knivet* Justice said there, *That* J. S. *should not be amerced, because the Nusans was no Act of his, but the Trees grew so naturally of themselves.*

But

But perhaps it will be objected to me, Can no Amerciaments be set but by a Jury, or by the Oathes of twelve men?

Yet, I am of opinion it may be done by the presentment of the Surveyors of the Sewers, for that is *per Sacramentum parium* as the Law appoints; and in a *Nonsuit* we see daily that in such case the Plaintiff is to be amerced, and this amerciament shall be assessed by the Coroners of the County, as appears in *Greisley's* case; and so the Words of the Statute and of the Law may herein be satisfied. *Greisley's Case.*

Now I hope I have fully instructed the Commissioners, wherein they may learn whom to imprison, when to fine, and how to amerce in a legal and orderly sort, and according to the ancient and approved Rules of Law, and of the grand Charter; for in those things they are to direct their discretions by the said Rules, and they are to be guided thereby, and are not to proceed therein according to their own wills.

And herein I shall conclude the Second point of this part of the Law, that is, That Commissioners of Sewers have power to imprison, to fine, and to amerce; And that *B.* for refusing to obey their Order was justly imprisoned, and *C.* was as justly fined: And for the reasons and causes aforesaid, the Commissioners in their discretions, though the offences of both were alike, yet they had power to imprison the one and to fine the other. And now I do intend to proceed to the Fourth Point of my Case, and the Third Point I intend to handle in a more convenient place.

Distress.

THE Point of Distress in my Case is grounded upon these words of this Law, *viz. And all those persons and every of them to tax, assess, distrain and punish, as well within the Metes, Limits and Bounds, of old time accustomed, or otherwise, or elsewhere within the Realm of* England. 4 Point.

Three sorts of Distresses.

First, There be divers kinds of Distresses (*viz.*) Judicial, which always issueth out of the Rolls of the Court.

Secondly, Ministerial, and such Distress is to be performed by the Officers of these Laws, without any judgment diresting the same.

Thirdly, And there is a Distress of Common right, not given nor awarded by Judgement in Court, or by Warrant of the Commissioners, but incident to the thing it self.

And First of the judicial Distress which is awarded by the Court upon a presentment found of a Nusans, or in the recovery of an assize of Nusans, or in an Action of the case, as it appears by the 42 *Assiz. plac.* 15. 32 *Edw.* 3. 23. and 7 *Henr.* 4. 8. there a *Distringas ad Amovendum* shall be awarded to remove the Nusans; and so in case of a decay presented: As if *J. S.* suffer a Bank or Wall to decay, and that be presented, a *Distringas ad reparandum* shall be directed to the Sheriff to distrain *J. S.* to repair the same.

42 *Assiz.* pl. 15. 32 *Ed.* 3. 7 *H.* 4.

Secondly, A Distress Ministerial is where one is assessed or rated to pay a certain sum of money towards the repairing of a Wall, Bank, Sewer or Goat; here upon Warrant from the Commissioners of Sewers, the Officer expressed in that Warrant to distrain the cattel of the party which ought to pay the said Rate and Sess, and which did neglect to pay the same: And yet where there is a Rate and Sess imposed upon one by the Commissioners of Sewers, I am of opinion that the Collector or Officer may distrain therefore without any express Warrant from the Commissioners so to do; and my reason is grounded upon the Statute which is this, because the Statute and Commission which be the general Laws, do of themselves in this case give a Distress. And therefore in these cases, the Warrant of the Commissioners is superfluous, like to the Case in 20 *Eliz. Dyer. fol.* 362. where a fine was levied of Lands, to the intent that *J. S.* should have and receive a yearly Rent thereout, although

20 *Eliz. Dyer.*

in

in the conveyances there was no mention made, that the party might diſtrain for the ſame: Yet in that Book it is mentioned to be adjudged, *That the owner of that Rent might diſtrain for the ſame, becauſe the Statute of* 27 H. 8. *in that Caſe gave a Diſtreſs*: Upon which Statute the ſaid conveyance was grounded. So if there be two Coparceners to whom Land doth deſcend, and they make partition, and for more equality, ſhe that hath the better part doth grant to the other and her Heirs a yearly rent out of her Land, but limits no clauſe or power of diſtreſs, ſhe to whom this yearly rent is granted may diſtrain therefore: And ſo may a Bailiff diſtrain for an amerciament in a Leet without a Warrant, becauſe the general Law gives a diſtreſs in theſe Caſes. 27 H. 8.

Thirdly, And as touching a Diſtreſs of common right, It is in caſe where one doth hold his Land of his Lord as of his Manor, to repair a Bank, Wall or other Work of Sewers; the Lord of whom theſe Lands be holden may diſtrain his Tenant of common right to compell him to make theſe repairs; and the Diſtreſs given in the ſaid Caſe of the Coparceners, and in the ſaid caſe of amerciament in a Court of Leet, ſeem both to be diſtreſſes of common right: And that the Law is, that a Diſtreſs lieth for a Rate, Lot or Tax impoſed by the Commiſſioners of Sewers, it is manifeſt by the Caſe of *Rook's* in *Coak's* 5th *Report*, which is full and direct authority in the point. *Rook's* Caſe.

But yet note, That the Officer before he diſtrains, ought to give notice of the tax to the Party, and demand it, *Style* 13. *Style* 13.

In what place a Diſtreſs is to be taken.

NOW touching the place where theſe Diſtreſſes are to be taken, comes next into our conſideration, wherein the quality of the matter diſtrained for, and the power from whence the diſtreſſes are derived, are to be conſidered of.

And

And therefore if a Lord do diſtrain his Tenant *Ratione tenuræ*, for to repair a Well, Bank or other defence, this diſtreſs muſt be taken on the Ground holden by this Tenure and not elſewhere, for theſe Grounds are chargeable therewithall, as the opinion of Juſtice *Spilman* is 21 *Ed.* 4. *fol.* 38. But not as that caſe is, but in point of Tenure; for there the caſe was, That a preſentment was found *in hac verba videlicet Juratores preſent' quod eſt communis Regia via in Parochia Sancti Martini in Campis in Com' Middleſex inter Hoſpitia Epiſc' Dunelmenſis & Epiſc' Norwich totaliter ſeparandat' aquis & quod tam domini ſpirituales quam temporales & Juſticiarii domini Regis & Servientes ad legem & omnes alii Legis miniſtri & omnes alii per viam illam verſus Weſtmonaſter' itinerantes pro legibus domini Regis ibidem miniſtrandis & obſervandis ſæpius impediuntur per quod via illa taſaliter ſuperinundata exiſtit exceſſu emanationis aquæ pluvialis ibidem remanent' quam quidem aquam Epiſcopus Norwicenſis ratione tenuræ ſuæ ibidem evacuare debuit & quod ipſe & omnes predeceſſores ſui ratione Tenuræ ſuæ ibidem evacuare debent.* And in this caſe I take it the Land was charged, not as in reſpect the Biſhop of *Norwich* did hold the ſame of ſome Lord by the Tenure, to repair the Sewer to avoid the Water; but his Land ſtood charged with the ſame as a charge impoſed thereon by Cuſtome or Preſcription, as by the Preſident it ſelf appeareth; for if the Biſhop of *Norwich* had been by the Tenure of his houſe or Lands bound to avoid the Waters, there needed no Preſcription to have been alledged.

21 *Ed.* 4.

5 *H.* 7. Alſo in 5 *H.* 7. *fol.* 3. there is a like Preſentment made againſt an Abbot, *Quod ipſe & predeceſſores ſui*, ought to repair a gutter *ratione tenuræ terrar' ſuar'*; but becauſe in that caſe the Preſentment did not ſet forth where thoſe Lands lay which were charged, the Preſentment for that cauſe was holden to be void: So that there is a great difference between a Tenure charge, and a charge impoſed upon Land by Preſcription; For in the caſe where a Tenant holdeth his Land to repair a Bridge, Wall or Bank of the

Lord

Lord of the Fee, The Lord in this case may distrain the Tenant of common right by the Commonlaws of *England:* But where ones Land is charged by Prescription and Custome, there is no remedy to force and compell the Tenant to do the repairs but by Presentment, and upon a Presentment process may be awarded against him to distrain him to make the repairs.

And if upon a Presentment made by the Laws of Sewers, *J. S.* is charged to repair a Sewer, and a *Distringas ad reparandum* be awarded against him, the Sheriff may distrain the party in any place within the power of the Commission of Sewers. But this being a judicial Distress which issueth out of the Rolls, the Justices are tied to the limits and bounds of the Commission; Yet in *19 H. 6. fol. 7.* the case was, *That the Admiral of* England *hath jurisdiction in causes arising onely on the Seas, and he hath no jurisdiction or power to meddle with any thing done upon the Land:* Yet upon a Presentment made in the Admiral Court one was Presented and Amerced, and a distress for this amerciament was taken on the Land, and exception was thereto taken, that the distress was taken out of the jurisdiction of that Court: But there *Newton* chief Justice and the rest of the Justices said, *That the power of the Admiral to hold plea was restrained by Statute to matters arising on the Seas, but Executions were not so.* *19 H. 6.*

And I have further observed by the Book of *8 R. 2. Fitzher. Avowry 253.* that where no place is certainly prescribed to distrain in, that in such a case the distress may be taken in any place within the power and jurisdiction of the Court, out of which the Writ or Warrant of distress doth issue: As if one be amerced in a Court Leet or in a Court Baron, he may be distrained for these amerciaments in any place within the jurisdiction of these Courts; and for an amerciament set and imposed in the Sheriffs turn a distress may be taken for it in any place of the County; for so far the power of that Court doth extend it self. *8. R. 2.*

Yet

Yet *quere* whether a diſtreſs can be taken for an amerciament in a Court Baron, in any other part of the Manor, ſave upon the Lands of the Offender: For in *Pill* and *Tower*'s Caſe, *Mich.* 42 *Eliz. C. B.* it ſeems to be the opinion of all the Juſtices of that Court, that ſuch a diſtreſs was not lawfull, unleſs there were a Preſcription for it; and in ſuch caſe ſome of the Juſtices held it good: but *Walmeſly* denied that the Lord could preſcribe to diſtrain for ſuch amerciament, anywhere within the Manor; *Crooke, Eliz.* 792.

Cro. Eliz. 792.

But in the caſe of a ſeſs, rate or tax impoſed by the Commiſſioners of Sewers, a diſtreſs for any of thoſe may be taken in any place within the Realm of *England*; for in this caſe the diſtreſs is meerly grounded upon the Statute, and is bounded by the ſame limits, which is as large as the Realm of *England*: And hereupon by this conſtruction made in this legal manner, all the words in the ſaid clauſe of this Statute have their full operation.

Rook's Caſe.

And although in *Rook*'s caſe the diſtreſs was there taken on the ground charged, yet that doth not prove but that a diſtreſs might have been taken in any other place; for I verily take it, that the place where the diſtreſs was taken, in that caſe was not intended any material point, though in my ſucceeding argument for another purpoſe I ſhall make it one. So that my opinion touching diſtreſſes to be taken in caſes of Sewers, appears to ſtand upon theſe three diſtinctions.

1. Firſt, that the Lord of whom the grounds be holden to make the repairs, muſt diſtrain on the grounds ſo holden, and not elſewhere.

Secondly,

Secondly, That upon a *Diſtringas ad reparandum* or *Amovendum* upon a Preſentment, which iſſueth out of the Rolls of that Court, and is a judicial proceſs, a diſtreſs muſt thereupon be taken within the bounds of the Commiſſion of Sewers *Ex congruitate.*

Thirdly, A diſtreſs for a rate, or ſeſs, or tax aſſeſſed and impoſed by the Commiſſioners of Sewers may be taken in any part or place within the Realm of *England*; for this is a diſtreſs grounded upon the Statute, and is as large as the extent thereof. And ſo the difference appears where the diſtreſs is guided by the Commiſſion, and where by the Statute.

Whoſe goods may be diſtrained.

IT comes now in turn to be handled, whoſe goods may be diſtrained and taken within theſe Laws. For the words of diſtreſs be put ſo generally in this Statute, that they muſt receive their expoſition by the Rules of the Commonlaw, in regard theſe Laws do give no ſpecial direction therein; and therefore the diſtreſs mentioned in *Rook's* caſe *Rook's Caſe.* may in this place be queſtioned: For there *Carter* was aſſeſſed, but the goods of *Rook's* were diſtrained and taken for the ſaid aſſeſs, and no challenge or exception was there made of it; and no marvel, for it was ſpecially found that the goods were taken and diſtrained on the grounds charged, for otherwiſe that diſtreſs had been tortious; wherein I take this diverſity, That where grounds are chargeable to repairs of defences, and a Seſs is thereon impoſed by the Commiſſioners of Sewers, the goods of a Stranger may be taken therefore on the grounds ſeſſed; and this is warranted by *Rook's* caſe. But *Rook's* being a Stranger, his goods could not in any ſort have been taken for the Seſs impoſed upon *Carter*, but on the grounds charged: and the like Law for Rents and Services iſſuing out of Lands, the goods of a Stranger Levant and Couchant on the grounds ſo holden may be diſtrained for Rents and Services, by 7 *H.* 7. a. and 7 *H.* 7. 11 *H.* 7. 4. 11 *H.* 7.

But put the case a little farther, that in the Sessions Court of the Sewers, *A. B.* is amerced for Non-payment of his Sess towards the repairs of a work of Sewers; and in this case I am of opinion, that the proper goods of *A. B.* are to be distrained for this amerciament, and not the goods of a Stranger going on his grounds charged to the said assess, because this amerciament is a collateral charge, which falls on the person of the offender who was to pay the assess, and doth not in any sort charge the grounds: and this opinion hath
41 El. 3. warrant from the case in 41 *Ed. 3. fol. 26. Br. Leet* 4. for there *A. B.* was amerced in a Court-leet, for receiving and keeping one in his House which was not sworn to the King; in which Case it was holden, that no Goods could be distrained for this amerciament, but onely the proper Goods of the Party amerced, although the Goods of others were levant and couchant on his Ground: And farther in proof of my said opinion; the Case of the Lord *Cromwell*
Dyer 322. in 15 *El.* in *Dyer, f.* 322. doth come fully thereto, which is, That a Replevin in an avowry was made for a pein and forfeiture of ten shillings, due for the breach of a Bye-law, *Contra ordinem Curiæ*, and alledged to make Bye-laws within the Manor by the custome thereof: In which Case it is apparent, that the proper Goods of the Party are to be distrained therefore, and not the Goods of a Stranger levant and couchant on the Grounds.

47 Ed. 3. And in the 47 *Ed. 3. fol.* 12. the Prior of *Tindal's* Case, where the Prior was amerced, and another Man's Goods were taken and distrained on the Grounds of the Prior for the said amerciament, and the distress was not well taken; and so my opinion may be conceived, that for an assess the Goods of a Stranger may be distrained on the Grounds charged, but may not there be taken for a fine or amerciament, which be collateral duties, and attend upon the Person, and do not charge the Soil.

Although the Goods of a Stranger shall not be distrained for an amerciament, though they are

are levant and couchant upon the Lands of the Party amerced; yet by the opinion of *Brampſton*, Chief Juſtice, *B. R.* 17 *Car.* 1. the Goods of an Undertenant may for an amerciament ſet upon his Landlord; and that without any particular cuſtome to warrant it: As where a cuſtomary Tenant is amerced for not repairing, in that caſe he held, that the Goods of his Under-tenant levant and couchant upon the cuſtomary Lands may be diſtrained for ſuch amerciament; *March* 161. *Thorne* and *Tyler's* Caſe; *Tamen quere*, for the reaſon of that Caſe in 41 *Ed.* 3. 26. that the amerciament falls on the Perſon of the Offender, and the cauſe of the diſtreſs doth not ariſe *ratione ſoli*, as is ſaid in *Br. Leet* 4. holds as well in the Caſe of the Under-tenant, as of a mere Stranger; But if this opinion of *Brampſton* be Law, by the ſame rule, the Cattel of an Undertenant of a Perſon amerced in the Court of Sewers, if they are levant and couchant upon his Lands, may be diſtrained for ſuch amerciament.

March 161.

Br. Leet 4.

This diſcourſe being thus ended, I ſhall now enter into a matter of greater moment; and yet becauſe theſe matters be frequent in buſineſſes of the Sewers, that which I ſhall here pretermit I will in ſome other place more fully diſcourſe of.

Goods ſold.

THE farther matter of this point will reſt upon this, whether Goods diſtrained and taken for a Seſs and Rate of Sewers may be ſold, or not; which point hath been oftner practiſed than the Law truly decided; But before I ſhall touch upon the main, I will make an Ingreſs to treat of ſuch matters whereby the property of a Man's Goods may be altered without his conſent.

1. And firſt, at the Common-law, if a Man's Goods be wrecked, waived or taken as ſtrays, or ſold in Market overt, the property may be altered.

2. Secondly, by Cuſtome, as in *London* upon a Foreign Attachment Goods may be attached and ſold to another: and in 10 *El. Dyer, fol.* 279. *b.* a Cuſtome is alledged to be in *York* that Foreign Goods there bought and ſold are ſeiſable by the Corporation, and ſo in caſe of a Heriot Cuſtome.

Dyer 279.

3. Thirdly, But the King by his Charter cannot take the properties of my Goods from me, as in the Caſe of *London* *Cook's* Rep. the Caſe of *Auſten* and *Waltham*, where King *Henry* the 6th granted to the Corporation of Dyers there by Charter, *That if upon ſearch they ſhould find any Clothes died with Logwood, that they ſeiſe them as forfeit*; but reſolved, that this Grant was in that point void.

Caſe of the City of *London.*

4. Fourthly, By a Bye-law in a Court-leet or Baron, the property of my Goods cannot be taken from me.

5. And fifthly, By a judgment againſt one at the Common-law, although a Man's Perſon nor his Lands were liable thereto, yet his Goods were.

Theſe five Grounds being firſt taken, I ſhall now examine the particular of our Caſe in queſtion touching the Law made by the Commiſſioners for ſale of Goods; and againſt this ſale many things may be alledged.

1. Firſt, This Statute I reade on gives a diſtreſs, and a diſtreſs is but a gage or pledge, and cannot be ſold; for if a Lord

Lord distrain his Tenants Cattel for Rent and Services, he cannot sell the Distress: And although in 10 & 11 *Eliz.* *Dyer, fol.* 280. a return irrepleviſable was awarded to the Lord or Avowant, yet he cannot sell this distress, nor work them by the opinion of that Book. *Dyer* 280.

Secondly, The Statute of 7 *Jac. cap.* 20. *Rastal Marshes* and *Fens*, doth enact, that a Commission in the nature of this of ours should be directed to the Bishop of *Norwich*, and others for the recovery of Fen-grounds; where for an assess imposed, and for Fines and Amerciaments, express power is given by that Statute to sell the Party's Goods which doth refuse to pay, *Ergo*, without such an express clause a sale of Goods could not have been lawfull. 7 *Jac.* 20.

And by the Statute of 1 and 3 *Jac.* the forfeitures of Alehouſekeepers may be levied by sale of their Goods, by the express letter of these Laws: and so it may be inferred, that our Statute wanting such an express clause to authorise a sale, therefore no sale can be. 1 & 3 *Jac.*

But much may be said to the contrary; for although in cases of sale the Laws be tender, yet it is plain, that both our Common-law, Customs and Courts of Justice daily use them, and are frequent in those sales: And we know that a distress is properly a pledge to be detained till satisfaction be made, and then to be restored, and is not to be sold: Yet in 3 *H.* 7. *fol.* 4. a distress taken for an amerciament in a Leet or Law-day may be sold as well in the case where the Subject hath by Charter or Prescription the profits of the said Courts, as where the King himself hath them; and all the reason which that Book yieldeth for it, is, because they be the King's Courts; And so it was likewise resolved in *Godfrey*'s Case, *Roll* 1. 76. and the reason there given why such a distress may be sold, is, because it is for a publick matter: But a distress taken for an amerciament in a Court-baron cannot be sold; no not although it be a Court-baron of the 3 *H.* 7. *Roll* 1. 76.

Bulſtr. 1. 53. 22 Aſſiz. Cro. Jac. 255. King's, *Bulſtrode* 1. 53. And in 22 *Aſſiz. plac.* 72. and *Cro. Mich.* 8 *Jac.* 255. it is ſaid, *That if one recover a debt in a Court-baron, the Goods of the Debtor could not be ſold therefore*; At leaſt, if there be not a cuſtome to warrant it; for by the opinion in *Brownlow* 1. 41. it ſeems that Goods may be ſold upon a *Levari facias* out of a Court-baron, if there be a cuſtome for it. Yet I have ſeen always in practice, that for debts and damages recovered in the County-Courts, the Goods of the Debtors have and be uſually ſold for them by *Levari facias*; and in my opinion this is uſed *per totam Angliam*: and a ſale in ſuch a caſe in a Court-baron by cuſtome is good; and with this agreeth the Book of 7 *H.* 4. *fol.* 27. and 21 *H.* 7. *f.* 40. in a Leet-court one preſcribed and alledged a cuſtome to have of every one which made an affray within his Liberty, a certain ſum of money, and preſcribed alſo to diſtrain for it, and to ſell the diſtreſs: and with this agreeth 11 *H.* 4. 14. and 11 *H.* 4. *fol.* 2. A diſtreſs taken for the Knights Fees of the Parliament was ſold. Therefore now let us ſee and examine well by what authority our Officers of Sewers may ſell the diſtreſſes taken. The words in our Statute which are moſt powerfull in this point, be theſe, (*viz.*) *To depute and aſſign diligent, faithfull and true Keepers, Bailiffs, Surveyors, Collectors, Expenditors, and other Officers for the ſafety, conſervation, reparation, and making, repairing, reforming and amending of the Premiſſes and every of them, and to hear the accompts of the Collectors and other Miniſters, of and for the receipt and laying out of the money that ſhall be levied and paid in and about the ſame*: Here is the word (*Levy*) uſed, and money levied is properly upon a ſale, execution or forfeiture; And the words of our Statute go farther, (*viz.*) *And to diſtrain, or otherwiſe to puniſh the Debtors and Detainors of the ſame by fines, amerciaments, pains, or other like means after their good diſcretions*; and no likelier means

7 *H.* 4. 21 *H.* 7. 11 *H.* 4.

to

to these is there any, than to make sale of the Debtor's Goods for non-payment of his sess, and it is consonant to other Laws: also in another part of this Statute are used these words, *And the Clerk by the Commissioners to be assigned to have two shillings* per diem *of the rates, taxes, lots and waives as shall be assessed or lost by authority of the said Commission, to be levied and paid by their discretions*: And so it seemeth by the very express letter of this Law, the taxes, sesses and rates may be levied by the discretion of the Commissioners, which if they please may be by sale of the Offender's Goods: And in many parts of this Statute, the Justices of Sewers have power to make Laws, Ordinances and Decrees, which being done according to reason, shall be held for firm and inviolable: And therefore upon just cause in my opinion, the Commissioners may make a Law or Ordinance for the sale of Goods in furtherance of this service; and this being a Law which tendeth so much to the service of the Commonwealth, and is so profitable and commodious for the same, it is therefore good reason to extend the same, and the exposition thereof, as far as the Letter and intent of the Letter shall reach; which may be as far as shall stand with reason, and rules of other Laws, Statutes, Customs and Usages of other Courts which have power in sale of Goods in causes of this nature; and is not altogether without president: For in the Charter of *Romney Marsh, pag.* 36, & 37. It is said in these words in a debate between *Hamo* and *Godfrey*, *Et predictus Hamo concessit pro se & aliis quod computabit cor' vigint' quatuor Jurat' elect' de patria super districtionibus & averiis capt' predicti Godfredi pro predict' Walliis & watergangiis repar' ab initio istius placiti usque nunc, &c. & districtiones illas secundum quantitatem portionis sibi contingent interim pro predict' Walliis & watergangiis reparandum sicut predict' est per predict' districtiones quod idem Hamo & alii satisfacient in omnibus quod injunctum fuerit per predicti comput' inter eos de surplusagio recepto de averiis venditis predict' Godfredi occasione predict'.* Hereby it is manifest, that *Hamo* the Bailiff sold the Cattel

Ch. *Romney Marsh.*

of

of *Godfrey* to make the repairs of the Walls and the Watergangers; and our Statute gives power to the Commissioners of Sewers to doe after the customs of *Romney Marsh*, which by this president formerly vouched, wartants the sale of Goods.

And it was ruled in the Case of *Combs* and *Cheny*, *Mich.* 24 *Car.* 1. *B. R.* that the Commissioners of Sewers may sell a distress, *Aleyn* 92.

Aleyn 92.

Yet herein I am of opinion, that the Bailiffs which distrain cannot *Ex officio* without a special Warrant first directed to them for that purpose from the Commissioners, make sale of Goods distrained for a lay, tax or sesi of Sewers; And I take it, it were a good Warrant for the Commissioners to make an advised special Law of Sewers for sale of Goods distrained upon a just occasion, before they direct any Wartant *Ex subito* to the Bailiffs, or for any such purpose.

But now herein follows a matter of some consequence, and worthy the handling, That if by the Laws of Sewers goods may be sold towards the repairs of these works, as in my opinion they may, Then whose goods may be sold is the question next to be decided; wherein to be brief, I am firm of opinion, That no goods can or ought to be sold by the power of these Laws of Sewers, but onely the proper goods of the party sessed and taxed, though the goods and chattels of other men be Levant and Couchant on the grounds sessed to the repairs: For I hold it not consonant to reason, nor that it stands with any rule of Law, That the goods and chattels of a stranger should be absolutely taken away from him, and sold for the dept and default of another man. And to this purpose the case put in the 3 *El. Dyer*, *f.* 199. may firly be applied to this point, where a custome is alledged for a Lord of a Manor to have and take the best Beast which his Tenant had at his death; and if such best Beast should be esloyned, that then he might have and take the best Beast of any other Levant and Couchant

3 Eliz.

upon

upon the Land; and this was adjudged a void cuſtome, as to the goods of a ſtranger to be made ſubject to ſuch a forfeiture.

It ſeems queſtionable, whether the Rule, That no goods can or ought to be ſold by the power of theſe Laws of Sewers, but onely the proper Goods of the Party ſeſſed and taxed, be ſo general, as is here ſet down; For if a man be taxed in reſpect of his Land, and he ſells or lets the Land to another, it ſeems reaſonable that the Goods of the Aſſignee may be diſtrained and ſold for the tax, becauſe the ſame is a charge upon the Land, into whoſe hands ſoever it comes; And the reaſon here given by our Reader why no Goods but thoſe of the Party aſſeſſed ſhould be ſold, *viz.* that it ſtands not with any rule of Law, That the Goods and Chattels of a Stranger ſhould be abſolutely taken away from him, and ſold for the debt and default of another man, holds not in this caſe; for the Aſſignee is not a Stranger to the Land, nor conſequently to the debt, for he takes the Land *cum onere*; and this ſeems to be the meaning of what is ſaid in *Style* 13. in the Caſe of *Whitley* and *Fawſett*, *B. R.* That for nonpayment of a tax impoſed by the Commiſſioners of Sewers, the Cattel of the Owner of the Land taxed, or of his Aſſignee, may be diſtrained and ſold; But a Stranger's Cattel upon the Ground cannot be ſold. *Style* 13.

Thus far I have pursued my argument in discoursing upon these distresses, and touching such matters as do depend thereon, because in my experience I have found them the readiest part of the execution of these Laws; and I have heretofore beheld much enormous proceedings therein, both in the Commissioners and in their Officers, and therefore I thought it very needfull to have treated thereon for their better direction in these affairs hereafter.

Replevins.

YET as I find distress to be the most usefull execution of these Laws of Sewers, so I have seen the proceedings therein much stayed and interrupted by the usual suing of *Replevins*, by which means the said distresses taken by the authority of these Laws have been set at liberty, and the work of Sewers hath been much lested and hindred thereby. And therefore the fifth point in my Case doth minister a good occasion to enter into the serious examination of them.

And now my intent is, to declare in what case a Replevin doth lie, and where not; and surely this point hath heretofore been much stirred in, and not without some cause, for the very Statute seemeth to allow of Replevins in these words, *(viz.) That if any action of Trespass, or any other Action shall be attempted against any person for taking any Distress, or for any other thing concerning the Law of Sewers, that the Defendant in such Action may make Avowry, cognisance or justification, that the taking of the said Distress, Trespass or other Act, whereof the Plaintiff complained was done by the authority of the Commission of Sewers, for a Lot or Tax assessed by the said Commission, or for other such Act or cause as the Defendant did by the said Commission:* And in what action can a man so properly make his avowry, Cognisance or Justification as in a Replevin, being a word onely apt for that action; and a Distress in *de jure naturæ*, properly repleviable by the Commonlaw: and for direct authority in the

point,

point, it appears in *Reek's* case, that a Replevin was there sued for the delivery of the distress taken by the power of these Laws of Sewen: But I must here distinguish, for I am of opinion a Replevin doth not lie, nor ought not to be granted from the Sheriff, or any of his Deputies, for that the Sewer is a Judicial Court of Record, and of greater authority than the power of the Sheriff, which in these cases was but Ministerial; and the highest authority that he hath is but vicontiel, which is much inferior to the power of this Commission; and therefore the Sheriff is not of sufficient power to supersede a Court of higher power. Yet if one sue a Replevin, which afterwards in Bank was abated, and a return of the Cattel there awarded, another Replevin did lie by the opinion of the Book of 34 *Henr.* 6. *fol.* 37. and so it appeareth by the Statute of *Westminster*, *chap.* 2. but these new Replevins came out of the said Courts where the former was, for it is not likely, that the Sheriff could make deliverance by his Warrant of Cattel, contrary to the award and return of a Court of Justice in a *Returno habendo*; and therefore by the same Statute the *Secunda deliberationes*, is now to be awarded out of the Rolls of the Court whence the *Returno habendo* came: And if one would resemble this case with other authorities, and with the reason of other Book cases of the Law, it will be made thereby apparent, that the higher Court may take or remove a cause out of the inferior Court, but not *E contra*, neither can the inferior Court supersede the superior: For if one be impleaded in the King's Court at *Westminster*, and in coming towards *London* he is arrested in a Corporation Court, he may be delivered thence by the power of the superior Court to the which he was attendant, and the power of the inferior Court shall be superseded thereby, as the Law is declared in divers of our Books; By the which it is plain, that ones person being in the privilege and protection of the King's Court, could not justly be imprisoned by the power of an inferior Court: And in *Stringfellow's* case in 3 *Ed.* 6. *Dyer fol.* 67. The goods of one were seized by the

Reek's Case.

34 H. 6.

3 Ed. 6.

Sheriff by process out of the Chancery for a subject, and after seisure, and before delivery thereof was made, a Writ of Prerogative came out of the Exchequer, rehearsing thereby, that the King was to be served before any other, and commanding the Sheriff to levy the same on the goods of the same Debtor; And whether these goods that lay under the power of a Process in one Court might be taken from thence by the power of another Court, was the question; and the better opinion therein, as I take it was, that they could not, for that by the former Process they were privileged from all other Jurisdictions, powers and authorities, especially if they were of an inferior degree: Yet there be two cases which not being curiously looked into make shew as if the Law were otherwise; the one is in the 11 *Hen.* 4. *fol.* 2. where the goods of *J. S.* were taken in Execution by the Sheriff by a *fieri facias* which came out of the King's Court of *Westminster*, and the Sheriff sold them to *J. D.* and there was a Replevin sued in that case, but no deliverance made of the Cattel in Court: and the other case is in 7 *Hen.* 4. *fol.* 28. goods were taken by a Levy which issued out of a Court Baron, and they were sold by the Bailiff, and there was also a Replevin sued, but no deliverance made of the Cattel in Court, neither would the Court order the defendant to gage deliverance: so that by these two cases it may seem that a Replevin did lie, though another Court had formerly the jurisdiction of the Cattel taken by the distress: But, under favour, I hope I shall easily reconcile these Books, and shall make it to appear that they do not make against my opinion formerly delivered upon this diversity, That when the Goods were seized or taken by Process, and remained by the vertue thereof in the hands of the Sheriff or of his Bailiffs, during that time no Replevin did lie in the case; but after such time as the goods or cattel were sold away, as in the said two cases formerly alledged they were, then against the party that bought them, or any other, a Replevin did lie in the case; for after the sale they were out of the protection of the former parties, and

and then a Replevin might well take hold of them, being out of all other Jurisdiction. And the ſame difference I take in this caſe of the Sewers, that is, That ſo long as goods diſtrained by Warrant and Proceſs out of this Court of Sewers remain in the cuſtody thereof, they be not repleviſable by the Warrant of the Sheriff or of his Deputies, but after they be ſold away, then by the ſale thereof they are out of the protection and privilege of the Court of Sewers, and then the Sheriff may cauſe them to be delivered by Replevin. Yet it may be objected unto me, that in *Rook's* caſe a Replevin was taken againſt him which detained the diſtreſs by Warrant of the Commiſſioners of Sewers; it is true, the Book is ſo, which caſe I admit, and that the Replevin was well granted there; yet I take it, it doth not contradict my ſaid opinion, becauſe there *Carter* was aſſeſſed, but the goods of *Rook's* were taken and detained for the Seſs, and *Rooks* did ſue the replevin, which he might well do, becauſe againſt him or his goods there was not any Law of Sewers extant or in force, neither was he or his goods within the privilege or juriſdiction of theſe Laws of Sewers: But if *Carter's* Cattel had been taken, who was the very party ſeſſed, he could have had no Replevin from the Sheriff or his Deputies to deliver his Cattel.

But although a Replevin doth not lie in the caſe aforeſaid from the Sheriff or his Deputies, *Ex officio* to deliver a diſtreſs of Sewers, yet out of the King's Court at *Weſtminſter* a Replevin doth lie in thoſe caſes: And the Charter of *Romney Marſh pag.* 18. doth afford us in this caſe a very good Preſident; for there complaint was made to the King, ſetting forth thereby, That whereas his Highneſs had appointed and authorized *Henry de Bathonia* to be his Juſtice, and to determine the differences depending and touching the repairing of the defences of the ſaid *Marſh*, he had ordained, that diſtreſſes might be taken according to the 24 Jurators, *ita quod nullus vicecomes aut alius baliuus noſter intromittat in diſtrictionibus illis, tu tamen* (meaning the Sheriff Ch. *Romney Marſh.*

Sheriff of Kent) *nihilominus districtiones illas propter hoc factum per viginti quatuor Juratores in prejudicio consideratio-nis eorundem reluxasti, tibi igitur precipimus quod districtio-nibus illis in nullo te intromittas*; and in the ſame Charter the like matter is there alſo ſo determined of *pag.* 7. By the which may be collected, that the Sheriff *Ex officio* might not meddle with ſuch diſtreſſes: and in the ſame Charter, *pag.* 8. the words be further, *Quod ſi quis de conſideratione predict' diſtrictionis ſe injuſte gravat' ſentiret & inde conque-ri vellet ad ipſum Dominum Regem querelam ſuam deferret & ipſe in Curia ſua juſtitiam fieri facere reſervaſſet*; whereby it is manifeſt, that a Replevin lay for a diſtreſs taken in the King's Courts, for that they be of a ſuperior authority and juriſdiction to theſe inferior Courts of Sewers: And therefore the Replevins which our Statute aims to give way to, are intended to be taken out of the King's Courts, which in Law and Juſtice ought to be obeyed, and not from the Sheriff or his Officers by virtue of their Office onely.

But in my caſe the Commiſſioners made a Law, that the goods of *A.* ſhould be ſold without allowance of Replevin, which is a good Law upon the diſtinctions and diverſities aforeſaid; that is, that *A.* who was the perſon aſſeſſed might not have or take a Replevin becauſe he was a per-ſon bound expreſly by the Law, nor that the Sheriff or his Officers *Ex Officio* might grant a Replevin to deliver the ſame, being under the power of this Law of Sewers.

But the King's Courts at *Weſtminſter* may in thoſe caſes of Sewers deliver the diſtreſſes; and this conſtruction made of this Statute, as I take it, ſtands with Laws and Reaſon.

31 *Ed.* 3. And in the 31 *Ed.* 3. *Brook*, *Replevin*, *plac.* 60. the Caſe is put, a man did grant to *A. B.* a rent out of his grounds, with power that if it were behind that he might diſtrain therefore, and detain the diſtreſs againſt gages and pledges; and yet it was adjudged, that if the rent were behind and the grantor diſtrained, he could not detain this diſtreſs a-gainſt the Replevin: Yet here were the direct words of the party himſelf to the contrary, but his words could not o-

verrule

verrule the Law: So that upon all theſe matters, I hold theſe Tenents following.

Imprimis, To make a general Law to reſtrain all Replevins, granted either from the Sheriff or the King's Courts, is no good Law or Ordinance of Sewers; for that Replevins *de jure* are in ſuch caſes grantable out of the King's Courts, and ſuch a general Law ſavours too much of oppreſſion, in ſtopping up the Gates of Juſtice. 1.

Secondly, For a Sheriff or his Deputy to grant and award Warrants of Replevin *Ex Officio*, to deliver goods or cattel diſtrained, and detained for a Tax and Law of Sewers, is in my opinion againſt Law, and need not to be obeyed, for that the diſtreſs was *Sub protectione ſuperioris Curiæ*, which is of a higher degree than a Sheriff's Miniſterial Warrant. 2.

Thirdly, If a diſtreſs be taken and ſold for a Seſs of Sewers, a Replevin lieth againſt the buyer, for by the ſale the goods and cattel were put out of the protection of the Court of Sewers. 3.

Fourthly, If a Rate or Tax be impoſed by the Laws of Sewers upon *J. S.* and the goods of *John a Downs* be taken therefore on the grounds of *J. S.* which were charged, *J. D.* may ſue a Replevin of his ſaid cattel from the Sheriff, for that he nor his goods were not expreſly bound by the Laws of Sewers. 4.

Fifthly, A Replevin lieth out of the King's Courts of *Weſtminſter*, to deliver a diſtreſs taken and detained by the Laws of Sewers, for that they be Courts *de altiore natura*. 5.

Agreeable hereunto is the Opinion of *Heath* Juſtice *B. R.* in the Caſe of *Commins* and *Maſſam*, That the Proceedings of the Commiſſioners of Sewers are examinable in the *King's Bench*, upon a Replevin brought there; *March* 198. *March* 198.

Sixthly,

6. Sixthly, A diſtreſs taken by a Lord on his Tenant for not repairing a work of Sewers, which by the Tenure of his Land he ought to do and repair, the Tenant may ſue a Replevin from the Sheriff *Ex Officio* to deliver the diſtreſs, for that this diſtreſs was not taken or detained by Warrant, Judgment or Decree of Sewers.

7. Seventhly, If upon a Judgment given in the King's Court, or upon a Decree made in this Court of Sewers, a Writ or Warrant of *Diſtringas ad Reparandum*, or of that nature be awarded, and the parties goods be thereby taken, theſe goods ought not to be delivered by Replevin to be taken either out of this Court, or out of any other Court of the King's, becauſe it is an Execution out of a Judgment.

8. Eighthly, Although one grant a Rent out of his Land with clauſe of diſtreſs, and with Grant or Covenant that the Grantee might diſtrain and detain this diſtreſs till he ſhall be ſatisfied his Rent, Yet a Replevin lieth in that Caſe.

A perpetual charge.

SO now I have fully and at large declared my Opinion touching diſtreſſes and replevins; wherein, I hope, I have fully ſatisfyed the firſt point of my Caſe: I intend therefore now to proceed to the ſixth point, which concerns charges and ſales of Lands to be made by the Commiſſioners of Sewers by the power and authority of this Law.

And Firſt, I ſuppoſe the queſtion may be extended to this, that is, Whether the Commiſſioners of Sewers can impoſe a perpetual charge upon Land to repair a work of Sewers for ever by the power of theſe Laws.

I do here acknowledge, that this is a knotty Point, yet ſomething may be alledged in maintenance of this Opinion affirmatively: For in the parts of *Holland* in the County of *Lincoln*, almoſt every one knows which part he is to repair and maintain in perpetuity; And *Experientia eſt optima*

rima interpres rerum; And it appeareth by the Charter of *Romney Marsh*, *pag.* 12. That the use there was to impose perpetual charges on singular persons; For the words there be these, *Juratores per eor' sacrament' mensurabunt per perticam omnes terras & Tenementa quæ infra dictum Marisc'um periculo subjacent quibus mensuration' factis viginti quatuor per communitatem prius electi & jurati habito respectu ad quantitatem Walliar' terrar' & Tenement' quæ periculo subjacent per eor' sacrament' ordinabunt quantum ad predict' arum Walliar' sustentationem & reparationem faciend' & sustinend' ad quemlibet pertineat, ita quod proportion' acrar' terrar' periculo subjacent' singulis assignetur sua portio perticar' & predict' assignatio fiat per locos certos ita ut scietur ubi & per quæ loca, ad quantum, singuli defendere teneantur.* These words in this Charter seem to be plain, That by the Laws established in *Romney Marsh*, the Commissioners had power to assign to every man his portion to repair in perpetuity; but I find no such words in our Statute: And whereas it may be said, that our Commissioners have power to make sale of the Lands; *Ergo*, They may charge them perpetually; but this is a *non sequitur* for that, for the sale they have express Warrant, but not so for the charge; And powers and authorities must be duly pursued, and are not to be taken by equitable or argumentable collections or implications, so that it may seem the Laws of Sewers were never held so perdurable as to bind mens Lands with perpetual charges: And therefore this difference I take, That by the custome of a Town or Countrey, every one may know his particular portion, which the owners of grounds are obliged and bound to repair perpetually; but without such a Custome it hath been held, That the Commissioners of Sewers cannot bind any mans inheritance to a perpetual charge, by any power or authority given by this Statute; but in the said case of *Romney Marsh*, the Custome there maintained this point: yet *Nota bene verba hujus Statuti*, which be these (*viz.*) *And to make and ordain Statutes, Ordinances and Provisions from time to time as the case shall require, for the* Ch. *Romney Marsh*, p. 12.

safegard, construction, redress, correction and reformation of the Premisses and every of them, and the parts lying to the same, necessary and behoofefull, after the Laws and Customs of Romney marsh *in the County of* Kent, *or otherwise, by any ways or means after their own wisedoms and discretions:* These be the words, and this is the clause which must make good this perpetual charge, for that it doth formerly appear, that such like Laws and Customs there were in *Romney Marsh* as this is; and therefore I may conclude this point, that the Commissioners in imitation of the said Ordinance of *Romney Marsh*, may make Decrees to bind Lands to perpetual charges; Yet Sir *Edward Cook* in *Keighley's* case sets it down as resolved, *That the several Commissioners of Sewers throughout all* England, *are not bound to pursue the Laws and Customs of* Romney Marsh; but in case where some particular place within their Commission have such Laws and Customs as *Romney Marsh* hath, there they might pursue them. But in my own Opinion, the Commissioners may, if they please, make Ordinances and Laws like to those of *Romney Marsh*, where there hath not been any such use; and the words of the Statute, as I take it, will bear that construction; and the said Opinion of Sir *Edward Cook*, is not directly against this. And upon Decrees for sales of Land, it is usual in those Decrees to bind those Lands to the perpetual repairs.

Keighley's Case.

Sales of Lands.

THE words of the Statute which be made for sales of Lands be these, *Provided always, That if any person or persons being assessed or taxed to any lot or charge for any Lands, Tenements or Hereditaments within the Limits of any Commission hereafter to be directed, do not pay the said lot and charge according to the Order and Assignment of the Commissioners, having power of the execution of the said Commission, &c. by reason whereof it shall happen, the said Commissioners for lack of payment of such lot and charge to decree and ordain*

ordain the ſaid Lands and Tenements from the owner or owners thereof, and their Heirs, and the Heirs of every of them, to any perſon or perſons for term of years, term of life, in Fee ſimple, or Fee tail, for payment of the ſame lot and charge: Then every ſuch decree and ordinance ſo by them made, ingroſſed in Parchment, and certified under their ſeals into the King's Court of Chancery, with the King's royal aſſent had to the ſame, ſhall bind all and every perſon and perſons that at the making of the ſame Decree had any intereſt in ſuch Lands, Tenements and Hereditaments in uſe, poſſeſſion, reverſion or remainder, their Heirs and Feoffees and every of them, and not to be in any wiſe reformed, unleſs it were by authority in Parliament hereafter to be ſummoned and holden within the Realm.

And alſo that the ſame Laws, Ordinances and Decrees to be made and ordained by the Commiſſioners, or any ſix of them, by authority of the ſaid Commiſſion, ſhall bind as well the Lands, Tenements and Hereditaments of our Sovereign the King, as all and every other Perſon and Perſons, and their Heirs, and ſuch their intereſt as they ſhall fortune to have in any Lands, Tenements and Hereditaments, or other caſual profit, advantage or commodity whatſoever they be, whereunto the ſaid Laws, Ordinances and Decrees ſhall in any wiſe extend, according to the true purport, meaning and intent of the ſaid Laws.

This Clauſe or Proviſo was ſtrangely placed in this Statute, as if this Statute had not been the firſt Father of it, and as if this Law had made ſome addition to a former Law: But I take it, that this Statute was, and is, the firſt and onely Law which gave ſale of Lands in Caſes of Sewers, and this Clauſe ſtands upon theſe four Pillars.

Imprimis, For what cauſe Lands may be ſold by the Commiſſioners of Sewers. 1.

Secondly, What Lands are to be ſold within theſe Laws. 2.

Thirdly, What Perſons, what Eſtates and Intereſts are to be bound thereby. 3.

4. Fourthly, To what Persons these Lands may be sold or decreed.

The Statute is, *If any Person sessed do not pay*; whereby it is manifest that the Lands are to be sold for sesses and charges imposed by the Commissioners which lieth in payment onely, and they may not be decreed away for any other cause or matter: And therefore if one hold his Land to repair a Wall, Bank, Sewers or other work of Sewers, and he neglect to repair the same, the Commissioners of Sewers cannot for this cause decree the Lands away from the Owner, because this charge lay not in payment: And I cannot gather out of the words of this Statute, that Lands can be decreed for any cause than for non-payment of a lot sess or charge, by reason this word *payment* is reiterated three or four times in this branch of the Statute, and no other words be coupled with it to infer any other or larger exposition.

If *J. S.* do hold his Lands of the Lord of a Manor, by the payment of twenty shillings yearly or other sum, towards the repairs of a work of Sewers, and he do neglect to pay the same, whereby the Work is unrepaired, although this is a charge which lieth in payment, yet because it grows due by Tenure by the Common-law, and was not imposed by the force of this Statute, therefore the Lands of *J. S.* cannot be decreed from him by the non-payment thereof, by the tenor and virtue of this Law of Sewers.

But if the Lands of one be generally charged to repair such a Wall or other work of Sewers by prescription, covenant or otherwise, and the Commissioners impose a sess and rate upon him to repair it, and he do not, there in this case, although the charge was by the rules of the Common Laws, yet because the sess and rate was set upon him by the power of this Statute, I am of opinion, that for neglect of payment the said Lands may be sold by the Decree of the Commissioners of Sewers.

So if one do hold his Lands for the payment of twenty shillings to repair a Bank, and the Commissioners of Sewers do

do order the Party to pay the twenty ſhillings at a time by them preſcribed (not being contrary to the uſual days of payment) and he do neglect to pay, The Commiſſioners may decree his Lands from him, becauſe this charge, by reaſon of the ſaid Order, had got the force and power of this Statute.

If a charge be generally laid upon a Townſhip, Hundred or Rape, which is not paid according to the Commiſſioners Order, no Lands can be decreed in this caſe, becauſe no Perſons or Lands be in this caſe particularly charged, and the Decree of the ſale muſt be directed by, and depend upon the ſeſs: but if after the general ſeſs be laid, the ſame be after aſſeſſed upon particular Perſons by particular ſums by the ſaid Commiſſioners, then upon default of payment, their Lands making default may be decreed from them by the power of this Statute.

If an aſſeſs or charge of payment be laid upon certain Lands without mentioning the Owner, the Lands cannot be decreed from him by this Law; for the words of the Statute be (*That if any Perſon or Perſons aſſeſſed to any lot or charge do not pay.*) So that I ſhall take it, that no decree for ſale of Land can be made but where there is a Perſon certainly aſſeſſed by name.

Lands cannot be decreed away from the Owners for default of payment of fines, amerciaments or pains; for though theſe be ſums of money or charges impoſed by the Commiſſioners of Sewers on Perſons certain for matters touching theſe Laws, yet becauſe they were not ſeſſed or rated towards the repairs of any works of Sewers, but be ſet upon the Parties as mulcts and puniſhments, and be due to the King, therefore no decree of Lands can be made for any of them.

Now the ſecond part of this Clauſe is, what Lands may 23.
be decreed by the authority of the ſaid Statute; and thereby it appears they muſt be ſuch Lands as lie and be within the power of this Commiſſion of Sewers; and herein reſts a difference between the caſe of a diſtreſs for a ſeſs which

may;

may be taken in any place within this Realm, and the decree of ſale of Lands for non payment of a ſeſs which muſt lie within the bounds and extent of the Commiſſion; for this diſtreſs is circumſcribed to the extent of the Statute, which is over the whole Realm, and the ſale is tied to the limits of the Commiſſion: And I am alſo of opinion, that no Land can be ſold away by the decree of the Commiſſioners of Sewers, but ſuch as were charged with the ſeſs.

If one hold his Lands in *Comitat' Eboram* to repair a Seabank in the County of *Lincoln*, and the Owner is aſſeſſed therefore, and makes default of payment, the Commiſſioners of Sewers in the County of *Lincoln* may give warrant to diſtrain for this ſeſs in the County of *York*; but they cannot decree away by ſale thoſe Lands lying there which were charged with the ſeſs.

A Copyholder's Land cannot be decreed againſt him by this Law, for if it might, then theſe cuſtomary Lands ſhould be tranſferred from one to another, contrary to the Cuſtoms of the Manors whereof they be parcel; and it would infringe that rule which is delivered in *Heydon's* Caſe in *Cook's* 3d *Report*, which is, when an Act of Parliament doth alter the ſervice, tenure and intereſt of the Land or other thing, in prejudice of the Lord, or of the cuſtome of the Manor, or of the Tenant, there the general words of ſuch a Statute do not extend to Copyholds: And in this caſe if any ſale ſhould be made by the Commiſſioners, all the ſaid Rules ſhould be infringed, for it were contrary to the cuſtome to paſs theſe Lands without ſurrender; it were in prejudice of the Lord to have Copyhold-land paſſed, and he to have no fine: And I am likewiſe of opinion, that the Freehold of theſe Lands could not be paſſed away for a ſeſs or a lay, becauſe the Lord hath but the ſhadow, and the Copyholder hath the ſubſtance; But if the Lord's Rents of Aſſize ſhould be aſſeſſed as they ought to be, and he do neglect to pay, then theſe Rents might be decreed from him; and ſo may all other Lands, Tenements and Hereditaments decreed, in reſpect whereof one is ſeſſable and ſeſſed by theſe Laws.

Heydon's Caſe.

The

The third branch of this Clauſe is the direct point in my Caſe (*viz.*) *What Perſons and what Eſtates be bound by theſe decrees?* And firſt of the Heirs in tail, whether they be bound by a decree made againſt the Donees in tail their Anceſtors, is the queſtion; In the handling whereof I hold it fitting, to ſhew in what caſes the Heirs in tail have been bound by the act of their Anceſtors, and the reaſons and cauſes thereof. 3.

And therefore if a Diſſeiſor make a gift in tail, and the Donee in tail grant a rent to the Diſſeiſee for releaſe of his right, this will bind the Heir in tail, for that by this releaſe his Eſtate, which before was defeiſable is now confirmed, as by the Books of 44 *Ed.* 3. 22. and 20 *Ed.* 4. 13. appeareth: and ſo in 46 *Ed.* 3. a gift in tail was made *ita quod* the Donee might alien to the benefit of the Heirs in tail; and this by Judge *Welbey* was held a condition which bound the Heir in tail for his benefit: And in 12 *Ed.* 4. 1. *Tregoſe* and *Taltarm's* Caſe was, That a recovery againſt Tenant in tail, with a Voucher by him over, did bind the Heirs in tail, by the Common-law, by reaſon of the intended recompence which was to come to him by the Voucher; and ſo a lineal warranty with aſſets, and a collateral warranty without aſſets, were and be both of them bars to the Iſſues, by reaſon alſo of the intended recompence; and theſe are things which were originally tied to thoſe Eſtates, and were incidents to them *ab initio*: And therefore this ſhall ſuffice to treat of bars to the Iſſues in tail by the Common Laws; and now I ſhall proceed to ſhew in what caſes they were barred of their Eſtates by the Statutes of this Realm. 44 *Ed.* 3. 20 *Ed.* 4. 46 *Ed.* 3. 12 *Ed.* 4.

By the Statute of 16 *R.* 2. *cap.* 5. The Lands and Tenements of one attaint in a Premunire are to be forfeited to the King; and in 21 *Eliz.* one *Trudgin* was Tenant in tail, and was attainted in a Premunire, and the queſtion was, Whether intailed Lands were forfeited againſt the Iſſues in tail, or not? And in Doctor *Forſter's* Caſe in *Coke's* 11th *Report*, it is there ſaid to be reſolved, that the general 16 *R.* 2. 21 *El.* 11 *Rep.*

words

words of that Statute did not repeal the Statute of *Weſtminſter* 2. of Intails, and ſo the forfeiture was there reſolved to continue but for the life of *Trudgin*, and did not bind the Iſſues in tail.

Weſtm. 2.

A judgment in debt againſt Tenant in tail, or if he be bound in a Statute or in a Recognizance in the nature of a Statute, the Lands intailed were not extendable, nor to be held in extent by the Statutes of *Weſtminſter* 2. *Aſſon Burnel*, or by the Statute *de Mercatoribus* by any of the general words of theſe Laws; but the Statute of 33 *H.* 8. *cap.* 39. by expreſs words bindeth the Heirs in tail, for their Lands whoſe Anceſtors ſtood indebted to the King by Judgment, Recognizance, Obligation or other ſpecialty.

Stat. Aſſon Burnel.
Stat. de Mercatoribus.
33 *H.* 8.

But the Statute of 26 *H.* 8. *cap.* 13. Enacts, *That every one which ſhall be attainted of Treaſon, ſhall forfeit the Lands whereof he is ſeized of any Eſtate of Inheritance*; and by this Statute intailed Lands were forfeited; and the words (*Of any Eſtate of Inheritance*) were the words which gave that forfeiture, the one in fee-ſimple, the other in fee-tail; and the word (*any*) preſuppoſeth more Eſtates of Inheritance than one.

26 *H.* 8.

But whether a decree of ſale of Lands made by Commiſſioners of Sewers ſhall bind the Heirs in tail, is the point of my caſe; and in my opinion I think they ſhall be barred, for the cauſes and reaſons following:

First, The words of the Statute of Sewers be, *That ſuch a decree ſhall bind all and every Perſon and Perſons that at the making of the ſame decree had any intereſt in ſuch Lands, Tenements and Hereditaments in uſe, poſſeſſion, remainder or reverſion, their Heirs and Aſſigns:* So that by expreſs words it binds the Heirs; and it would have bound the Heirs of a Tenant in feeſimple, without the word (*Heirs*) expreſſed in the Statute; therefore the word (*Heirs*) needed not, but onely for the binding of the Heirs in tail.

Alſo if theſe Lands were charged by preſcription, as many Lands be, then were the Lands originally bound, and the Heirs in tail ſtand charged with theſe ſeſſes, as well as Land in fee-ſimple.

And

And laſtly, This is a Law enacted for the preſervation of the Commonweal, and is more to be favoured than particular Eſtates of Heirs in tail: But the caſe of the Premunire was penal in point of a forfeiture, which is to be ſtrictly taken for the King, and favourably for the Subject; and therefore in my opinion, the Heirs in tail ſhall be bound in theſe caſes of ſale, and the rather becauſe they be within the words of the Statute, *videlicet*, Heirs generally put, which extends to Heirs in tail, as well as to Heirs in fee-ſimple; and becauſe the ſeſs and charge ſhall bind both alike, ſo in my opinion the ſale ſhall bind both, in regard the ſale depends upon the charge and ſeſs.

If a Prebend, Parſon or Vicar, Dean, Biſhop or ſuch like, which be ſeiſed of Lands in their politick capacity be ſeſſed to repairs of works of Sewers, their Lands cannot be decreed away from them in ſuch ſort as to bind their Succeſſours; for as this Statute of Sewers extends to bind Lands by decrees in perpetuity, ſo the Statutes of 1 and 13 and 14 *Eliz.* reſtrain Alienations, and where thoſe Statutes reſtrain them, I am of opinion, that this general Statute of Sewers doth not diſpence with thoſe Statutes. In *Croſt* and *Howel's* Caſe in *Plow. Com.* a fine with Proclamations and non-claim by five years did bind the Corporation of the Myſtery of the Cooks in *London* for their right in Lands, and ſo all other Corporations which are abſolute of themſelves, and needed not the aſſent of any other, as Majors and Commonalties, Deans and Chapters, Maſter and Fellows of Colleges: but the Law is otherwiſe of Parſons, Vicars, Prebends, and ſuch like; And the like expoſition do I make of them in this Statute of Sewers. But I will here make a diſtinction; I am notwithſtanding of opinion, That the Parſons, Vicars, Prebends, and ſuch like, for their own neglect, are bound during their times, but not their Succeſſours after them; And note, this Statute though it mention Heirs, yet it doth not at all mention Succeſſours, which is worthy of conſideration alſo: And in my opinion this Statute as to decrees to be made of Lands will bind Women

1, 13 & 14 El.

Croſt and *Howel's* Caſe.

Covert-baron, Infants, Perſons that be *non ſanæ mentis*, and ſuch like, becauſe it is a Law made for the ſafety of the Commonwealth: And ſo it is held in *Zouch's* Caſe in the *Com.* That the Statute of 4 *H.* 7. of Fines had bound Infants, Idiots and Women Covert-baron, had they not been excepted in that Statute; *A fortiori* ſhall they be compriſed in this Statute, for the Statute of fines was made for the peace of the Weal-publick, but the Statute of Sewers was made for the ſafety thereof.

Zouch's Caſe. 4 H. 7.

If there be two Tenants in Common which be ſeſſed towards the repairs of a Wall, Bank or ſuch like work of Sewers, and one of them do neglect to pay his proportionable part, Whether Commiſſioners may decree a moiety without partition both of the ſeſs and Land, is a queſtion; for their Eſtates are ſeveral, though there be a community in taking of the profits: And therefore the matter is, whether the aſſeſs ſhall attend upon the poſſeſſion which is in Common, or upon their Eſtates which be ſeveral: And although Commiſſioners in aſſeſs be not bound to take notice of their Eſtate, yet if they take upon them to decree a Man's Lands from him, they are then to take notice of his Eſtate, and of all other circumſtances neceſſarily depending thereupon: In 22 *H.* 6. *fol.* 12. if a treſpaſs be done upon Lands which are held in Common, they are to join in an Action, but if one of them die that Action ſhall ſurvive, for though they were joint in the perſonalty, yet they diſjoined in the realty.

22 H. 6.

If the treſpaſs or wrong be done to the Land by ploughing, removing a Boundary, *&c.* both the Tenants in Common ſhall join in the Action, and that is becauſe the one hath as great wrong as the other; But if the Beaſts of one Tenant in Common be diſtrained or chaſed, he onely ſhall have the Action; *Latch.* 152. *Jones* 142.

Latch 152. *Jones* 142.

My

My Lord *Coke* 1 *Inſt.* 198. *a.* gives the ſame reaſon why the Action ſhall ſurvive, as was intended here by our Reader, *ſcil.* becauſe albeit the property or Eſtate be ſeveral between Tenants in Common, yet the perſonal Action is joint, and every perſonal Action ſhall ſurvive: But the words here are tranſpoſed; For whereas it's ſaid, (though they were joint in the perſonalty, yet they disjoined in the realty;) it ſhould have been, (though they disjoined in the realty, yet they were joint in the perſonalty:) For the onely reaſon that could be given why the Action ſhould not ſurvive, is becauſe they disjoined in the realty, and upon this ground it was urged by *Danby* in the aboveſaid Caſe of 22 *H.* 6. that if treſpaſs were done in the Land, and one Tenant in Common dies, the Survivor ſhould not have an Action of Treſpaſs of the entierty. But the Court overruled him therein; and the reaſon is becauſe they were joint in the perſonalty, and therefore the Action ſhall ſurvive; and not becauſe they disjoined in the realty.

If two Tenants in Common of Land join in a grant of ten pounds rent-charge out of their Lands, the Grantee ſhall have ten pounds yearly of either by the opinion of Mr. *Perkins*; and of *Coke* 1 *Inſt.* 197. *a.* for that every man's grant ſhall be taken moſt ſtrongly againſt himſelf, and therefore they are ſeveral grants in Law. But if a ſeſs of ten pounds be laid and impoſed upon them by this Law of Sewers, this ſeſs

1 *Inſt.* 197. a.

ſhall not double as the rent ſhould; yet in this caſe of a joint aſſeſs impoſed upon Tenants in Common, and one would pay his moiety, and his Companion refuſeth, the Commiſſioners of Sewers cannot ſell a moiety of the Land, for that it is a joint ſeſs, and was not impoſed by moieties, and the ſale doth depend upon the ſeſs, and all may not be ſold; for that one Tenant in Common cannot prejudice his Companion in things of realty.

4. The fourth matter is to whom Lands may be decreed by this Law; for by the words of the Statute it appeareth, That the Commiſſioners have power to decree Lands for default of payment for years, for life, in tail, or in fee-ſimple; whereby the Law intended they ſhould make their decrees for ſale, according to the quantity of the ſeſs, and ſo ſhould uſe moderation in the Eſtates they made or ſold therefore; and it was not intended they ſhould ſell the fee-ſimple away for ſeſs which might be ſatisfied with the making of a leſs Eſtate.

And I am of opinion, that this decree doth make the Eſtate, with the help of this Statute, according to the limitation which ſhould therein be declared, and that the Party ſhall have Eſtate according as the ſame is thereby limited unto him; and this is no equitable decree which binds the Perſon onely, as Chancery decrees be, but it binds the Land, and therefore the Commiſſioners may not decree Lands to a Corporation, as to a Major and Commonalty, Dean and Chapter or ſuch like, which be Mortmain, for the general words of this Statute do not repeal the Statute of Mortmain in my opinion.

And herein I ſhall end my Argument touching Decrees; and I take it, though the intereſt of *B.* was intail, yet the ſale thereof might be made by this Statute for the cauſes and reaſons aforeſaid: And now onely remains under my cenſure to declare my opinion, whether the Commiſſioners of Sewers did juſtice, in refuſing to admit of Pleas of diſcharge which were tendred to them by *A.* and *B.* wherein may come juſtly into our conſiderations theſe things, (*viz.*)

Whether

Whether Traverſes, Pleas of Exemptions, and other legal proceedings, may be had in this Court of Sewers, or not; ſaving I add this, that theſe decrees of ſale being binding, muſt be certified into the Chancery, with the King's Royal Aſſent had thereto.

Legal proceedings.

Traverſe.

TO enter into theſe parts of my Law, I think it fit to begin with *Traverſe*, and to deliver my Opinion, whether ſuch pleas and proceedings are to be admitted into this Court; for a Traverſe is a Plea of the party containing matter to the contrary of that that the party ſtands accuſed of, or which is laid to his charge: And in ſome caſes our Books and authorities of Law admit the party to a Traverſe, and in other Caſes the ſame is to be denied; for in 5 *H.* 7. *fol.* 9. & 45 *Ed.* 3. *fol.* 8. & 28 *H.* 8. in *Dyer*, *fol.* 13. if one be preſented in a Leet Court for a Blowipe or any other perſonal wrong, this Preſentment is not Traverſable, but the party is without remedy therein, though the Preſentment be falſe and the matter of it untrue; and the Law is ſo alſo of ſuch a Preſentment made in a Sheriff's Turn: and herewithall agreeth the Books of 2 *R.* 3. 11. & 19 *H.* 8. 11. *Fitz. Aſſiz. plac.* 442. & 8 *Ed.* 4. 5. and the reaſon thereof is delivered in 5 *H.* 7. becauſe no Proceſs is there awardable againſt the party to call him to anſwer: Yet in the ſame Book of 5 *H.* 7. it is ſaid, *That if a Preſentment be made which toucheth a mans Freehold, he may there Traverſe the ſame.* But I take it the party muſt firſt remove the Preſentment into the King's Bench, and there Traverſe it; for in the Court Leet, in my Opinion, there can be no Traverſe taken or tried, no more where the Preſentment toucheth Freehold, than where it onely concerneth a perſonal wrong: Therefore the reaſon alledged in 5 *H.* 7. cannot be the

5 *H.* 7.
45 *Ed.* 3.
28 *H.* 8.
2 *R.* 3.
19 *H.* 8.
5 *H.* 7.
8 *Ed.* 4.

the true cauſe wherefore in perſonal wrongs the Preſentments cannot be traverſed; but the very true reaſon therein is, as I take it, becauſe theſe petty Preſentments be of ſuch petty trifling matters, that in avoidance of trouble the Law eſteemed them not worthy of Traverſe and Trial; and Juſtice *Fairfax* in 5 *H.* 7. is of opinion, *That a Preſentment made before Juſtices of Peace in a Seſſions is traverſable:* and with this agreeth *Stanford*, *fo.* 183. and in other Courts of Law there oftentimes fall out matters which one ſhall not be admitted to take a Traverſe unto, and in ſome other caſes he ſhall, as by theſe ſucceeding authorities may appear. In the 37 *Aſſiz. plac.* 7. a Preſentment was taken before *Green* and *Ingham*, Juſtices of the King's Bench, That *J. S.* who had killed *A.* had goods to the value of Eighty pounds in the hands of one *John Lombard*; and upon the Preſentment a *Scire facias* was awarded againſt *John Lombard*, to ſhew cauſe wherefore theſe goods ſhould not be ſeized to the King's uſe: *John Lombard* came in and tendred a Plea to the Preſentment, that theſe goods were not the Felons, but that they were delivered to him to keep to the uſe of a Cardinal of *Rome*, and he was there admitted to this Plea; and with this agreeth 45 *Ed.* 3. *fol.* 26. expreſly: Yet in that book and Mr. *Stanford*, *fol.* 183. it is holden for Law, That if it be preſented before a Coroner that *J. S.* killed *A. B.* and fled for the ſame fact, and after upon his trial he is acquit, yet he ſhall forfeit his goods upon the *Fugam fecit* before the Coroner, and he ſhall not be received to take any Traverſe to the ſaid Preſentment in that Point. The difference in which two caſes is this in my opinion, that a ſtranger, as *John Lombard* was, in the firſt caſe, ſhall not be peremptorily concluded; for it were no reaſon one man's goods ſhould be forfeited in another man's default, and he ſhould have no anſwer thereunto: But in the other caſe, in Terror of Felons, though he be acquitted of the Felony, yet he is not acquitted of the flying, and he may be guilty notwithſtanding his acquittal. There be other caſes in the Law which admit no Traverſe, as in *James Bag's* caſe

Stanford 183.

45 *Ed.* 3.

James Bag's Caſe.

Cook

Cook 11 *Rep.* where a Writ was directed to the Major and Burgeſſes of *Plymouth* to reſtore *Bag* to his Aldermans place there, which they had put him from, and they return a cauſe ſufficient to bar him, which notwithſtanding is falſe; yet he ſhall not be received to his Traverſe therein; neither could a Traverſe be admitted to the Certificate of the Biſhop, wherein was contained, that *J. A.* Parſon of *Dale* had refuſed to pay his diſmes to the King, by means whereof the Parſon loſt his benefice, which caſe is in *Br.* caſes, *temp. H.* 8. *pl.* 332. and *Dyer*, *fol.* 116. and 7 *H.* 4. *fol.* 4. and 21 *H.* 7. 8. and many other Books be, that no Averments ſhall be taken to the returns of Sheriffs to take any Iſſue thereupon. *Br.* Caſes. *Dyer* 116. 7 *H.* 4. 21 *H.* 7.

And in Dr. *Bonham's* Caſe upon a *Habeas corpus*, the Phyſicians returned the cauſe of his impriſonment, which was falſe; yet he could not be admitted to Traverſe the ſame. But yet by the opinion of theſe Books, an Action upon the caſe lieth againſt the Major and Aldermen, and againſt the Biſhop, for their certificates, and againſt the Sheriff for their falſe returns; and if Juſtifications be made by them they may be traverſed: But theſe will not reduce the parties to their former liberties (*viz.*) not the Alderman to his place, nor the Parſon to his Church, but damages in thoſe caſes are onely recoverable. Dr. *Bonham's* Caſe.

Theſe caſes I have put as Reaſons and Arguments againſt our caſe of Sewers; But yet I am of opinion, that a Traverſe may be taken to a Preſentment made in this Court of Sewers, and herein this Court may be reſembled to a Seſſions of the peace: And this Commiſſion of Sewers gives the Commiſſioners of Sewers power to hear and to determine at the King's ſuit, as well as at the ſuit of the party; and a Traverſe lieth of a Preſentment found before Commiſſioners of *Oyer* and *Terminer*, and is triable before them by the Books of 29 *Aſſiz. pl.* 33. and 12 *Lib. Aſſiz. pl.* 21. and the Earl of *Leiceſter's* caſe in *Plow. Com. fol.* 397. and the words of this Statute are ſufficient to yield the party the benefit of a Traverſe if there be cauſe; and for preſident in the 29 *Aſſiz.* 12 *Aſſiz.* *Com.*

Rom. Marſh. the point, Charter of *Romney Marſh*, *pag.* 23, and 24. one *Godfrey* being preſented that he ought to repair a Bank or Wall, and that he did neglect to do the ſame, and he came in and pleaded a Plea thereto before the ſaid Commiſſioners, *19 Aſſiz.* and in 19 *Lib. Aſſiz. plac.* 6. there were divers Preſentments before Commiſſioners of *Oyer* and *Terminer* for Nuſances done in the River of *Lee*, and the ſame were there traverſed and tryed: And the Statute of *1 H.* 4. *Chap.* 12. doth plainly admit of a Traverſe, wherein the words be, *That in caſe if any feel himſelf grieved by execution or otherwiſe againſt right and reaſon, let him purſue and he ſhall have right:* But I verily ſuppoſe, that thoſe things which the Juſtices of Sewers do by their view, or by ſurvey and diſcretion, are ſo binding that in thoſe caſes no Traverſes are to be admitted, becauſe theſe things are merely the acts of the Court, and of the Juſtices themſelves: and if they fine a man for his contempt in Court by a Record of their own view, and not upon a Preſentment, the party ſhall not be *Dr. Bonham's Caſe.* received to Traverſe this: and in Doctor *Bonham's* caſe it is ſaid, *That the act of a Judge is not Traverſable, if he be the abſolute Judge of the Cauſe; But in caſes done or certified by ſuch as be no abſolute Judges of the Cauſe, as Commiſſioners of Bankrupts, which certifie one a Bankrupt, he may Traverſe their in an action brought*, as was done in the caſe of *Cut* and *Delaber* in 7 *Jac.* in the common place, and *Vernie's* Caſe 1 *Mar Dyer fol.* 89. no Averment could be taken to the certificate of a Judge; and with this agreeth 7 *H.* 7. *fol.* 4.

Cut and Delaber. 7 Jac. 1 Mar. Dyer 89. 7 H. 7.

But although a Traverſe may be taken to a Preſentment in the Court of Sewers, yet times and ſeaſons muſt be obſerved; for if a Preſentment be there made, it may be Traverſed for the reaſons, cauſes and preſidents formerly mentioned; Yet if the cauſe have been there ſo far proceeded in as the Commiſſioners make a decree thereupon, I take it then no Traverſe at all can be taken, becauſe a decree is the final Judgment of the Court, and is an act Judicial which cannot be traverſed and tryed by a Jury, for that were to re-

fer

ſer the Judgment of the Court to be examined by a Jury, which may not be admitted; and at the Commonlaw, after Judgment no Traverſe can be taken: And if one be indicted at the general Seſſions of the Peace, this is traverſable; but if the party ſuffer himſelf to be outlawed upon the ſaid Indictment there, no Traverſe lieth, but a Writ of Error: So if in our Seſſions of the Sewers, the cauſe proceed to a decree, the party grieved is to take his way by preferring a Bill of Reverſal in manner as is done in the High-court of Chancery, and ſo he may have the cauſe here throughly examined.

Other Legal Proceedings.

THE words of the Statute which give the legal proceedings be theſe (*viz.*) *That the Commiſſioners of Sewers may hear and determine all and ſingular the Premiſſes, as well at our ſuit, as at the ſuit of any other complaining before them, after the Laws and Cuſtoms aforeſaid, or otherwiſe, by any other ways or means*; theſe words give the party remedy to ſue before the Juſtices of Sewers for ſuch things as are contained within theſe Laws, and which have their dependency thereon: In *Colſhil's* caſe in *Dyer*, *fo.* 175. the party preferred his Bill of complaint to the Commiſſioners, containing the effect of his Title to the Office in queſtion, and theſe were ſpecial Commiſſioners of *Oyer* and *Terminer*: Juſtices of the general *Oyer* and *Terminer*, may hear and determine Uſury by the Statute of 13 *El. cap.* 8. yet if *J. S.* be bound in a Bond of Ten pounds principal debt, and for Forty Shillings for Intereſt, although this Bond be for payment for uſury, yet an Action of Debt doth not lie thereupon before the ſaid Commiſſioners, but an Imformation may be preferred againſt the Lender there to puniſh him. *Colſhil's* Caſe. 13 *Eliz. c.* 8.

So by our Statute of Sewers an Action of Treſpaſs lieth not for a Treſpaſs done within the reach of this Commiſſion; yet *Diſtinguendum eſt*; for put the caſe a Seſs is laid upon a man, and the goods of *J. S.* not chargeable thereto

be taken and diſtrained, who is not chargeable to the payment thereof, *J. S.* in my opinion (though this caſe have but the Countenance of this Commiſſion) may have his Action or preſer his complaint before the Commiſſioners in this Court of Sewers for the recovery of his damages: And although this be but a private Action, yet the diſtreſs being taken by an authority drawn from the power of this Commiſſion, the party diſtrained may have his remedy in this Court by his private Action, becauſe it ſprung by the colour of the general power of this Court.

If *A. B.* have a ſeveral Piſcary in the River of *Witham*, which is a River within the Commiſſion of Sewers, and the ſaid Piſcary by theſe Laws is chargeable to the repairs thereof, if *C. D.* diſſeize him thereof, or commit a Treſpaſs by fiſhing therein, *A. B.* can neither have an Aſſize nor Action of Treſpaſs within this Court.

So if a Royal or Common River hath his current through the Town of *Dale*, and one *A. B.* is tied to repair the Banks there by Tenure, Preſcription or otherwiſe, which notwithſtanding in his default are broken down, and the Waters breaking out overflow the grounds of *C. D.* thereto adjoining, yet *C. D.* hath not any remedy to recover his damages againſt *A. B.* in this Court for the loſs of his grounds, but he is put to his private Action therefore at the Commonlaw; and with this agreeth the caſe of *Keighley*: But if *A. B.* be preſented therefore before our Commiſſioners of Sewers, they may order *A. B.* to repair the breach, but cannot award damages to *C. D.* for our Commiſſioners of Sewers are herein like to Juſtices of Peace, and to Stewards of Leets and Law-days, which have power originally to meddle onely with the publick wrong; Yet by the power of their Commiſſion, and of this Statute, they many times accidentally meet with private injuries, as by the inſuing caſes may appear.

Keighley's Caſe.

If a Townſhip be aſſeſſed by a Law of Sewers, and the goods of one of the Inhabitants be taken for the ſeſs, that party upon his complaint to theſe Juſtices of Sewers may have

have process out of this Court to call before them the rest of the Inhabitants which were subject to the said sess, to cause them to contribute towards the party's damage who was solely distrained for them all, for otherwise this Court should fail of justice in his own proper materials, and the Statute of 1 *H.* 4. *c.* 12. saith, *That he which is grieved, let him have remedy:* And if the goods of a man taken for his tax or sess be sold for the payment thereof, for more moneys than his sess came to, the Justices of Sewers have power to cause the Officer to restore the overplus, *Et cum hoc concordat* the Charter of *Romney Marsh.* 1 *H.* 4.

If the Commissioners of Sewers appoint the Officers to take so many Trees of *J. S.* at such a price, for the repairing of a defence against the Sea, or to make a Trench over the grounds of *J. D.* and thereto erect something toward these Actions, *J. S.* hath remedy to come by his moneys in this Court, and the other party over whose grounds this Trench is made, may be relieved in recompence to be made to him for the hurt in his grounds.

If Laborers or Workmen, as Carpenters, Masons, Smiths, Dikers, or other persons be set on work by the power of these Laws, they may by the same power recover their Wages before the Justices of Sewers; for the original cause sprung out of the power of this Commission, and this is there determinable, as incident to the authority of that Court: But if the original cause did not arise out of this Commission, as in some of the preceding cases they did not, then hath this Court no Jurisdiction of the matters depending thereon: And I do ground this diversity upon the reason of the Book-case put in 1 *R.* 3. *fol.* 4. where it is said, *That if the original cause do belong to the Court Christian, although in the proceedings therein some matters happen which depend on the principal, which do belong to the Temporal Court,* Yet *Accessarium sequitur suum principale,* and these matters shall also be determined in the Court Christian: And so if in a cause at the Temporal Law, as in a *Quare impedit,* and in the proceeding therein, some matter do a- 1 *R.* 3.

riſe depending on the principal cauſe, which belongeth to the Court Chriſtian, yet the Temporal Court ſhall continue his Juriſdiction thereof: And with this diverſity agreeth *Kelleway's Report, fol.* 110. ſo in our Court of Sewers, although a thing happen in the proceedings, which if it ſtood merely of it ſelf would not pertain *ad eor' examen*, notwithſtanding if it be but a matter accidental, and have his dependance upon a principal matter which is determinable in this Court, the other alſo ſhall be here determinable.

Kelway's Rep.

Juſtification by the Commiſſioners and Officers of Sewers.

IF a man be ſued for diſtraining Cattel or other Goods, or doing any other Act by vertue of the Commiſſion of Sewers, this Statute of 23 *H.* 8. *cap.* 5. hath provided, That the Defendant may juſtify by alledging in his Plea, that the ſaid diſtreſs or other act was done by authority of the Commiſſion of Sewers for lot or tax aſſeſſed by the ſaid Commiſſion, or for ſuch other act or cauſe, as the ſaid Defendant did by authority of the ſaid Commiſſion, and according to the Tenor, purport and effect of the ſaid Act; without any reherſal of any other matter contained in the ſaid Act, or any Commiſſion, Statutes or Ordinances thereupon made, whereupon the Plaintiff ſhall be admitted to reply, that the Defendant did take the ſaid diſtreſs, or did the ſaid Act of his own wrong, without any ſuch cauſe alledged by the ſaid Defendant;

fendant; whereupon Iſſue ſhall be joined, and upon the trial, the whole matter ſhall be given on both parts in evidence, according to the truth of the ſame: which is a beneficial clauſe for ſuch as act under the authority of the Commiſſion of Sewers, and exempts them from pleading all the ſpecial matter, which would be tedious, chargeable and dangerous.

Whitley brings an Action of Trover and Converſion againſt *Fawſett* for taking his Cattel by way of diſtreſs, and ſelling them by vertue of a Warrant of Commiſſioners of Sewers, for not paying of a Tax ſet by them towards the reparation of Sea-walls; the Defendant waves the benefit which this Act had given him, and pleads all the ſpecial matter; the Plaintiff demurs to this Plea, and it was reſolved, that ſeeing the Defendant had waved his benefit of the Plea, given him by the Statute, by pleading ſpecially, he ought to make good his Plea, as he hath pleaded it, at his own peril: And the Plea was adjudg'd to be ill, for ſeveral defects, which had been avoided, if the Defendant had pleaded as the Statute directed him; *Style* 12, 13. *Style* 12, 13.

In treſpaſs *B. R.* 2 *Car.* 1. for taking of Bullocks, the Defendant pleads that King *James* granted to divers Perſons a Commiſſion of Sewers, to endure ten years, and juſtifies the taking for a fine impoſed by the Commiſſioners,

ners, but ſhews not whether it was in the time of King *James*, or of King *Charles*; and it was reſolved by the Court, that he ought to have ſet forth the time; for the Statute of 23 *H.* 8. 5. is intended onely of circumſtances, but here the time is matter of ſubſtance; Addition to *Benlowes* 199.

Addition to *Benlowes* 199.

Exemptions.

IT may be a grand queſtion, Whether theſe Laws of Sewers will permit any Exemptions to any perſon or perſons, and by the ſtrict penning of the words of this Commiſſion it ſeems to oppoſe all ſuch privileges and diſcharges, as Exemptions be; The ancient Commiſſion which is in the Regiſter, and in *Fitz. Nat. Br.* are exceeding ſtrict; for the words therein be, *Ita quod aliquibus tenentibus terrarum ſeu Tenementum ſeu communiam paſturæ ſeu Piſcariæ habentibus diviti vel pauperi vel alteri cujuſcunque fuerit conditionis Status aut dignitatis qui defenſion' habere potuerint per predict' Wallias Gutturas Foſſata ſuoras pontes calceta & gurgites ſeu etiam damnum per trencheas predict' ſuſtinent vel poterint ſuſtinere ſive fuerint infra libertates ſive extra non parcantur in hac parte*; And the words in our Statute be in effect, *And all ſuch which reap profit or ſuſtain damage, ſhall be aſſeſſed*; which words ſeem not to admit of diſcharges: Yet in my opinion out of the ſtrict words of theſe Commiſſions there be ſome Exemptions, though not expreſſed in words, yet ſupplied in reaſon, and are to be added in conſtruction.

Regiſter. *Fitz. N. B.*

1. Firſt, For the grounds lying betwixt the Sea-banks and the Sea are in reaſon exempted from the charge of the Banks and Walls, becauſe they can take no ſafety thereby.

2. Secondly, Thoſe grounds which be upon an aſcent, and not on the Level, are alſo by the rule of reaſon exempted

ted from assesses to be imposed onely by the power of these Laws.

Thirdly, Where one or more be tied to repair a Bank, Wall or other Defence by Custome, Prescription, Tenure or otherwise, all others be in Law and reason exempted. 3.

Fourthly, A Parson and Vicar with Cure are not to be assessed for their Tythes, and divers of the Hereditaments formerly mentioned in Assesses be by the rule of reason exempted. 4.

Fifthly, But whether one may be discharged and exempted from the repairs of the works of Sewers by any special Custome or Prescription, is a great question of our case, in regard both the old and new Commissions *Quod nullus in hac parte parcatur* seem to toll all Prescriptions and Customs of discharge, and to admit of none of them: And the Charter of *Romney Marsh*, *pag.* 31, 32, and 33. beareth the same Exposition; for there *Godfrey* pleaded a Plea to discharge him of the repairs of the Walls and Waterganges, because he claims his Lands by Charter from the King, and also prescribed generally *in non reparando*, but he durst not abide his Plea; for there *pag.* 39. it is said, *That all having Lands should contribute, and that none might be spared*; and also *pag.* 53. be these words, *Quod staren ordinationi Jurator' predictor' nulla consuetudine resistente*; which words be direct in the point against such general discharges claimed by blind customs: Yet I have been credibly informed, that Sir *George Fitzwilliams* Knight, had a Custome in his Town and Manor of *Mabblethorp* in the County of *Lincoln*, called *Swiftage*, whereby he challenged to be freed from being charged to the repairs of the Sea-banks, because in consideration thereof he and his Ancestors have used in regard of their Manor there to do some other repairs as beneficial for the Commonwealth; and in my opinion, in such a special Custome one may be exempted; like to the case of Tithes, wherein one could not by the Common Laws prescribe in a *non decimando*, yet in a 5. Ch. *Romney Marsh.*

modus

modus decimandi he may, becauſe there is ſome competent conſideration given in lieu thereof; And ſo in my opinion one cannot generally preſcribe or alledge a cuſtome to be freed and clearly exempted from the repairs of Sewers, but by ſpecial cuſtome he may, as in the ſaid Caſe of Sir *George Fitzwilliams*.

The Lands of the King are not exempted from being taxed by virtue of the Commiſſion of Sewers; and therefore in the Caſe of *Whitley* and *Fawſet*, *Paſch.* 23 *Car.* 1. *B. R.* where it appeared, that there were 800 Acres of Land in the hands of the King, which were not taxed, as by Law they ought: it was held that the tax laid upon the other perſons within the Level was unjuſt and illegal, becauſe by the not taxing of thoſe 800 Acres, a greater burthen was laid upon the reſt of the Land within the Level, than of right ought to be, for that the King's Lands are taxable by the Statute, *Style* 13.

Style 13.

And therefore the Commiſſioners of Sewers in my Caſe did very juſtly and diſcreetly refuſe the ſaid general Pleas of diſcharge tendred to them by *A.* and *B.* and ſo I *ſuper totam materiam* conclude my Argument as I did my Caſe, That the Commiſſioners of Sewers did adminiſter true Juſtice in all the parts of theſe Laws.

Finis hujus Tertiæ Lecturæ.

Lectura

Lectura Quarta.

IT appeareth by this Statute I read on, that the Law-makers made it not the leaſt part of their care to have ſuch perſons put in truſt with the execution thereof, as ſhould be of great wiſedom and approved experience. And becauſe that perſons of profound wiſedoms, deep experience, tried Learning, generous Diſpoſition, and of good Eſtate, ſhould be put into theſe Commiſſions of Sewers, the Statute did make choice of four Honorable perſons to have and take the nomination of ſuch as ſhould for their Integrity, Learning, Wealth, Wiſedom and Experience, be worthy to be put into this Commiſſion. And therefore the Lord Chancellour, Lord Treaſurer, and the two Lord chief Juſtices for the time being, have by this Statute the nomination of our Commiſſioners; But as theſe great perſons of Honor by their high places are moſt commonly buſied in matters of great importance, they many times refer theſe matters to others, by means whereof divers perſons in ſome Countreys have of late years crept into Commiſſion, which this Statute doth not allow of, which do not onely want knowledge and experience, but which are alſo tranſported and carried away with ſelfwill, and ſerve moſt commonly to make a faction of the greater number to carry away buſineſſes, when the graver and wiſer ſort are forced (being overladen with popular voices) to give way to run into contrary courſes, and are made to ſurceaſe from making good and wholſome Laws and Ordinances, and ſometimes are as it were forced to agree to thoſe which are worſe; even as the Roman Dictator *Fabius* having joined to him the froward *Minutius*, was by the violent ſtream of his Collegue ſo croſſed and over-

ſwayed, not out of judgment, but ſelfwill, that he was forced to give way to *Minutius*'s frowardneſs, though it tended almoſt to the hazard and the overthrow of the whole Roman Army: And becauſe the Commiſſioners are the perſons through whoſe hands the execution of all theſe Laws muſt paſs, I thought it therefore very convenient to take into examination theſe parts of the Statute which touch and concern them: And I intend to purge the Commiſſion of ſuch of them as theſe Laws have diſallowed, and to that purpoſe I have framed this inſuing caſe, which I take it will give us occaſion to call them all into queſtion and to ſever the juſt from the unjuſt, the ſufficient from the unſufficient, and the learned from the illiterate.

The Caſe.

A. Demiſeth to *B.* and *C.* Land of the yearly value of Sixty Pounds *cum ſtauro* of the value of Two Hundred Pounds for their lives, the Remainder to *D.* a free Citizen of *Lincoln*, *B.* and *D.* diſſeiſe *C.* of the Land and take the ſtock, *C.* releaſeth to *D.* the goods abſolutely, and the Land upon Condition; *D.* dieth in Exile, *E.* his ſon and heir enters, *B.* and *C.* who enter for the Condition broken, *E.* and *Francis* Counteſs Dowager of *Warwick*, and three other Commiſſioners of the *Quorum* of Sewers, make a Law to raiſe a Were, erected upon a River navigable at the coſts of the party, becauſe it hindred the current of Waters.

My Concluſion is, That here be competent Commiſſioners in number and in Eſtate which made this Law, and that this Law is well decreed within this Statute.

The caſe I do diſtribute into theſe points, *viz.* Three at the Commonlaw, and four upon this Statute; the points I intend by the Commonlaw are theſe:

1. Firſt, Whether the Sixty Pounds ſtock can be demiſed and letten for life, with the Remainder over, as this caſe is.

Secondly,

Secondly, Whereas *B.* and *C.* be two jointenants in poſſeſſion, whether one of the Jointenants and a Stranger can ſo diſſeiſe the other Jointenant as to transfer thereby an intereſt and Eſtate to the Stranger. 2.

Thirdly, Becauſe the Releaſe dependeth upon the diſſeiſin, the queſtion is, in what manner it doth innure, and whether it ſhall expell *B.* out of that moiety, becauſe it is made to the Stranger; and then what is reduced by the condition, whether a poſſeſſion, action, or a right. 3.

Points upon this Statute.

Firſt, Whether the Son of the free Citizen exiled is a diſabled Commiſſioner, in reſpect of his Perſon; and whether he hath ſuch an Eſtate, either in Lands or Goods, as will ſatisfy this Law. 1.

Secondly, Whether the Counteſs may be a competent Commiſſioner within this Statute. 2.

Thirdly, Whether a joint intereſt in Lands or Goods will make the Jointenant a ſufficient inabled Commiſſioner within this Statute. 3.

Fourthly, Whether the Were, as this caſe is, be raced down or not. 4.

And hereupon I intend to lay open the whole diviſion, touching the Lets, Impediments and Annoyances which this Statute ſpeaketh of.

Argumentum Lectoris.

I meant it not for a point in this Caſe, whether Goods might be let with Land, nor whether a ſtock might be leaſed with a Farm, becauſe I find the Books of 1 *H.* 6. 1. 1 *H.* 8. 1. and many others full in the point that they may. And although by the taking of them back again by the Leſſor, they will thereby ſuſpend no rent, yet in the original demiſe they may be a cauſe to increaſe the rent: but my point herein is double.

Firſt, Whether they will paſs in remainder, as my Caſe doth limit them. 1.

Secondly, Whether they will inable *B.* and *C.* to be Commiſſioners of Sewers allowed by this Statute. 2.

I do not onely find ſtock let with Farms, but alſo joined in real Actions with Land: for in the Writ of Aſſize the words be, *Quod vicecomes faciat Tenement' illud reſeiſiri de catallis quæ in ipſo capta fuerint & ipſum Tenement' cum catallis eſſe in pace uſque, &c.* Theſe doubtleſs were ſuch Goods as ſtocked the Grounds, and which uſually went with the ſame, for in ancient times when any farmed Grounds, they uſually farmed the ſtock thereon going, and this appears by ancient preſidents; *Sed nunc aliud tempus.*

In the Writ of *Ejectione firmæ* in the Regiſter be contained theſe words, *Oſtenſum quare vi & armis manerium de Dale quod C. prefat' A. dimiſit ad terminum qui nondum preteriit intravit & bona & catalla ejuſdem A. ad valentiam, &c. in eodem manerio inventa cepit & aſportavit.* So that in thoſe Writs of Aſſize and *Ejectione firmæ*, the one to recover the Freehold, the other the Leaſehold: We find Goods which went with the Manor or Farm made parcel of the plaint; and I take it, damages ſhall be increaſed therefore; for theſe were ſuch Goods as ſtockt the Farms. And in *Wrotſly* and *Adams's* Caſe in *Plo. Com.* Exception was taken in abatement of the Writ, becauſe the words (*bona & catalla*) were leſt out of the ſame: Yet in my opinion, no Eſtate, neither *in preſenti* nor in remainder can be made of Goods or Chattels, neither ſhall they go with the Land in point of Eſtate, but ſhall paſs to the Leſſee, and after to him in the remainder, as a dependancy upon the Farm: And the Heir ſhall have Heir-looms, together with the Manſion-houſe, as things neceſſarily concurrent therewithall, yet the Heir-looms have no deſcending qualities, but they do go with land wait upon the Houſe, as neceſſary Inſtruments fitting to be uſed therewith; neither can it be gathered by the Book of 37 *H. 6. fol.* 30. that the Book called *The Grail* (which was deviſed by will to *A.* one of the Executors to have the occupation during his life, the remainder thereof in like manner to *B.* for his life, and after to be diſpoſed by the Executors to the Church-

Wrotſly and Adams's Caſe.

37. *H. 6.*

wardens,

wardens of *Dale*) that it did paſs to *A.* and *B.* in point of Eſtate, but onely the uſe and occupation thereof was diſpoſed to be ruled according to the ſaid Limitations, but the property remained in the Executors.

And a deviſe of ſuch uſe and occupation of goods in remainder, was, *Trin.* 17 *Car.* 1. *C. B.* adjudged to be good; but otherwiſe it is of a deviſe of the Goods themſelves in remainder, for ſuch deviſe is void; *March* 106. *Roll abr. tit. Deviſe*, 610. *March* 106. *Roll abr.* 610.

It was adjudged, *Mich.* 28 & 29 *Eliz. C. B.* that where a ſtock of Sheep was leaſed by Indenture, the property of them ſtill remained in the Leſſor; *Godbolt* 113. *Godbolt.* 113.

So in *Paramore* and *Yardley's* Caſe in the *Com.* and in *Matthew Manning's* Caſe in *Cook's Reports*, a Term of years could not be deviſed to *A.* for life, the remainder thereof to *B.* for his life, to paſs in this manner in point of Eſtate; neither could theſe Eſtates be made thereof, but by conſtruction the ſame was diſpoſed of to go by way of executory deviſe; and ſo the ſtock in my Caſe was not transferred in point of Eſtate with the Land, but in point of executory diſpoſition of the occupation and uſe thereof onely; and therefore if one let a ſtock of Cattel or Sheep with Grounds at the end of the term, the Goods as acceſſory with the Land as principal ſhall return to the Leſſor, and during the term the Leſſor hath the property of them, and the Leſſee the poſſeſſion thereof, and the Leſſee ſhall have the yearly profits thereof for his Rent; and here I do end this firſt Point, and will proceed to the reſt. *Paramore and Yardley's Caſe.* *Manning's Caſe.*

The ſecond Point.

There be two Jointenants, and one of them and an Eſtranger do diſſeiſe the other; what intereſt the Stranger gaineth thereby, is the queſtion.

I am

I am clear of opinion, as many Books be, That one Jointenant may diſſeiſe his Companion by an expreſs *Ouſter*, but when a Stranger joineth therein, in what part that doth alter the caſe is the matter; for if the Stranger ſhould get a joint Eſtate in poſſeſſion with the Jointenant whom he joined withall, that were to make a double Jointenancy *in uno eodémque gradu*: for the Jointenant which committed the diſſeiſin, which hath the poſſeſſion, and the Jointenant which was diſſeiſed and which hath the right, do hold jointenancy ſtill; for by 36 *Ed.* 3. a right may hold jointenancy with a poſſeſſion, and the one may take by ſurvivor from the other, in 9 *H.* 7. *fol.* 23. That he in remainder and a Stranger may diſſeiſe Tenant for life, and ſhall be both Diſſeiſors; but in that caſe they were both Strangers to the particular Eſtate: Alſo it is manifeſt that one jointenancy may be built upon another, As if two Jointenants be diſſeiſed by other two Jointenants of the right *ſtirps*, but not *ſtock*: But in our principal caſe, Whether one Jointenant might hold the poſſeſſion of a moiety with his firſt Companion in jointure, with his moiety in right, and can alſo *uno tempore* hold jointenancy in poſſeſſion with a Stranger, of the moiety upon which the diſſeiſin was committed, I ſuppoſe he cannot, becauſe then he ſhould hold partnerſhip with both of one thing: And therefore in my opinion the Stranger getteth nothing in my caſe, but is onely a Coadjutor, and no Diſſeiſor, which gets the Tenancy.

35 Ed. 3.

9 H. 7.

The third Point.

But admit the Stranger did get a moiety of a moiety by joining in the diſſeiſin, then what alteration this releaſe will work in my Caſe is the next queſtion.

Littleton. It is true as Mr. *Littleton* ſaith, That if there be two Diſſeiſors, and the Diſſeiſee releaſe to one of them, he ſhall hold his Companion out of all, and by ſuch releaſe he ſhall have the ſole poſſeſſion and ſtate in the Land; The like Law is in my Caſe of two Abaters and two Intruders:

truders: but if two Diſſeiſors be, and they make a leaſe for years, rendring rent, and then the Diſſeiſee releaſeth to one of the Diſſeiſors; I ſuppoſe this releaſe ſhall inure to both, becauſe the Leſſee for years, whoſe Eſtate ſhall be ſtrengthned by this releaſe, is in by the title under both of them, and now they are Tenants of a reverſion onely, and of a rent thereto incident, which was not got by the diſſeiſin, but was compoſed by the legal contract of the Parties; But the reaſon given for this in *Co.* 1 *Inſt.* 276. *a.* is grounded upon the ſaid words of *Littleton*, that if two Diſſeiſors be, and the Diſſeiſee releaſe to one of them, he to whom the releaſe is made, ſhall have the ſole poſſeſſion and eſtate in the Land; which he cannot have, where the Diſſeiſors have made a leaſe for years, before the releaſe; for by the leaſe, part of the Eſtate is in another, and therefore (ſaith my Lord *Coke*) in ſuch caſe the releaſe to one of the Diſſeiſors ſhall enure to both; and though our Reader here puts the caſe of rent reſerved upon the leaſe for years, yet the reaſon given by *Coke*, will as well hold, where there is no rent reſerved. The like Law is, if the Diſſeiſors make a leaſe for life, and then the Diſſeiſee releaſes to one of them, this ſhall enure to them both, for the ſame reaſon, becauſe he cannot by the releaſe have the ſole Poſſeſſion and Eſtate, for part of the Eſtate is in another, 1 *Inſt.* 276. *a.* 1 *Inſt.* 276. *a.*

So if two be admitted to a Copyhold by Tort, or to an Office in a Court of Juſtice unlawfully, though their entry be unlawfull, yet becauſe they came in by admittance, which is at the door of Juſtice, I ſuppoſe therefore, that if a releaſe

a releaſe be made to one of them by the Diſſeiſee, it ſhall inure to both, becauſe they had ſome colour and countenance to enter, more than expreſs Diſſeiſors or Intruders have.

But if a Son and a Stranger diſſeiſe the Father, and after the Father dieth, and the right deſcend to the Son, by this releaſe in Law, and by the acceſſion of the right by deſcent to the tortious poſſeſſion, it doth inure onely to the Son; and although this releaſe was upon condition, which by the breach thereof ſeemeth to ſet the Releſſor in the ſame ſtate he was before, yet it doth not admit the Joint diſſeiſor which was expelled thereby to become a copartner again with his fellow: As if the Son and a ſtranger diſſeiſe the Father, and the Father dieth, the ſtranger hereby is expelled by the deſcent of this right to the Son; yet if after a more near Heir is born, as the Elder Brother died his Wife enſeint with a Son, which after the deceaſe of the Grandfather is born, whereby the Inheritance of this Land is his; yet the other Jointdiſſeiſor which was expelled by the deſcent of the right of his fellow diſſeiſor, by the departure of the right with the poſſeſſion, cannot enter upon his fellow diſſeiſor, in my opinion.

But now the queſtion is farther, what is reduced by this condition, the right onely which was releaſed, or the poſſeſſion together with this right; for if but a right be reduced, then a deſcent hapning may perchance toll the entry of the Releſſor, and ſo he may be put to his Writ of right in Fee: And if it be a right of an inferior degree, as in our caſe it was but for life, then he ſhould be without remedy.

27 *Aſſiz. pl.* 2. 27 *Ed.* 3. But in my opinion where the releaſe doth inure by way of entry and Feoffment being upon condition, it may in that caſe by the breach of the condition reduce the poſſeſſion, and give the Releſſor a re-entry, becauſe *in Intelligentia legis* the Land was paſſed thereby, and not a right onely: But if it had inured by way of *Mitter le droit* onely, I take it then it would reduce but a right; But in our caſe

Bevil's Caſe. 4 *Regut.*

I ſup-

I ſuppoſe if it had had any working at all, it was by Entry and Feoffment; yet I think nothing did inure thereby to the ſtranger, which in my caſe is called *D.* becauſe he wanted the Freehold whereupon it ſhould inure.

And ſo I end my Common Law points, and I will now in hand with my Statute.

The part of the Statute whereupon I do ground my ſubſequent matters, doth contain in it theſe words (*viz.*) *That if any perſon or perſons of what Eſtate or Degree ſoever he or they be of, that from henceforth do take upon him or them to ſit by vertue of the ſaid Commiſſions, not being firſt ſworn according to the Tenor of the Oath expreſſed in the Statute; or if any perſon ſo named and ſworn do ſit, not having Lands, Tenements or other Hereditaments in Fee ſimple, Fee tail, or for term of life, to the clear yearly value of Forty Marks above all charges to his own uſe, Except he be Reſiant and free of any City, Borough or Town Corporate, and have moveable ſubſtance of the clear value of One hundred Pounds, or elſe be learned in the Laws of this Realm, in and concerning the ſame; That is to ſay, admitted in one of the principal Inns of Court for an utter Barriſter, ſhall forfeit forty pounds for every time that he ſhall attempt ſo to do, the one moiety to the King, the other moiety to the party that will ſue therefore*, &c.

So that by this clauſe it is manifeſt, that every one that is not qualified in one of theſe degrees, is no competent Commiſſioner within this Statute.

Firſt, That he be an utter Barriſter in one of the four Inns of Court. 1.

Secondly, Or have Lands, Tenements or Hereditaments of the clear yearly value of Forty Marks above all charges, in Fee ſimple, Fee tail, or for life. 2.

Thirdly, Or be free or Reſiant in ſome City, Borough or Town Corporate, and have moveable ſubſtance of the clear value of One hundred pounds. 3.

And that perſon which is not within one of the ſaid Three parts, and yet doth take upon him to ſit in the execution of the Commiſſion, incurs two penalties:

1. The one, the forfeiture of his diſcretion for his preſumption.

2. The other, of Forty pounds for his contempt.

And therefore for the more clear examination of theſe things, I will obſerve that method in my Argument, which my caſe hath formerly preſcribed to me.

1. And firſt of all, I ſhall proceed to the perſonal abilities, and firſt of the ſon of the free Citizen of *Lincoln*, I am of opinion, that every Commiſſioner of this kind muſt be indowed with theſe three qualities.

1. Firſt, He muſt be free of a City, &c.
2. Secondly, He muſt be there Reſiant, and
3. Thirdly, He muſt have in clear moveable Subſtance, One hundred pounds; and

} If he want any of theſe, then he is out of this Branch of this Statute.

} Therefore what perſon is ſuch a Freeman, is now to be handled.

I am of opinion, that every Subject born within the King's Dominion is a Freeman of this Realm, as appeareth by the Grand Charter, *Chap.* 14. yea though he be a Bond-ſlave to a Subject; but a ſtranger born is no Freeman of the Kingdom, till the King have made him Denizen, by whoſe power alone, without the help of any other, one may be made free: And to be a Freeman of the Realm, the place of his birth is held more material than the quality of his Parents; for if Aliens have a child in *England*, it is free of the Kingdom: yet by the opinion of *Huſſey* Chief Juſtice in 1 *R.* 3. *fol.* 4. and in *Calvin's* caſe of the *Poſt Nati*, it is holden for Law, That if Ambaſſadors of this Realm have children born in *France*, or elſwhere where the Father and Mother be natural born Subjects; the Children are free of the Realm of *England*; but if either the Father or the Mother of ſuch Children were an Alien, then are not thoſe Children free. One out of the King's protection, is, as I take

1 *R.* 3. 4 *Calvin's Caſe.*

it,

it, for that time no Freeman of the Realm: But in what Caſe a Man Exiled is in, ſoſteth the neareſt to our Queſtion.

Exile is one of the Eight Puniſhments which the Roman Laws did inflict upon Strangers, which be, *videlicet*,

1. *Damnum.*
2. *Impriſonamentum.*
3. *Plagæ.*
4. *Compenſatio.*
5. *Ignominia.*
6. *Exilium.*
7. *Servitudo.*
8. *Mors.*

Mr. *Bracton* doth in this manner deſcribe Exile, that is, *Certi loci interdictio*, and doth diſtribute it into Four heads; That is to ſay,

1. *Specialis, hoc eſt interdictio talis provinciæ Civitatis Burgi aut villæ.*

2. *Generalis, Interdictio totius Regni & aliquando eſt,*

3. *Temporaria, pro duobus tribus quatuor aut pluribus annis aut, &c.*

4. *Perpetua, pro termino vitæ & Exilium eſt aliquando ex arbitrio principis ſicut in exiliando Duces Hertfordiæ & Norfolciæ per Regem Ricardum ſecundum, Et aliquando per Judicium terræ ut ſit in caſu Piers de Gaveſton & etiam in caſu Hugonis de le Spencer junioris qui ambo fuerunt exiliati per Judicium in Parliamento.*

Abjuration alſo was a legal Exile by the Judgment of the Commonlaw, as alſo by the Statute Law; and in the Statute of *Weſtminſter the Second*, *Cap.* 35. He which raviſheth a Ward, and cannot render the Ward unmarried, or the value of his Marriage, muſt abjure the Realm; and this is a general Abjuration: And by a Statute made in 31 *Ed.* 1. Butchers are to be abjured the Town, if they offend the fourth time in ſelling meaſled Fleſh; and this is a ſpecial Abjuration. *Weſtm.* 2. 35. 31 *Ed.* 1.

But I muſt put this Caſe to a farther Queſtion, which is, What a man Exiled doth forfeit thereby? And in my opinion he forfeits theſe things following;

1. Firſt, He loſeth thereby the freedom and liberty of the Nation out of which he is Exiled.

2. Secondly, He forfeits his Freedom in the Borough or City where he was free; for he which forfeits the Freedom of the whole Realm, by conſequence forfeits his Freedom in every part thereof.

3. Thirdly, He is of as little eſteem in our Law as if he were dead, for his Heir may enter, and ſo may his Wife enter into her own Lands, and may ſue an Action as a Woman ſole, by 31 *Ed.* 1. & 1 *H.* 4.

31 *Ed.* 1. 1 *H.* 4. 1.

4. And Fourthly, in my opinion he ſhall forfeit thoſe Lands to the King, which he ſhall purchaſe in the Realm during his Baniſhment *quod vide* 15 *Ed.* 3. *Fitz. Petition' plac.* 2. But there in that caſe *Hugh Spencer* was baniſhed by a Judgment in Parliament, which gave a forfeiture of his Lands; howſoever I take him as ſtrongly barred from purchaſing in the Realm during his Baniſhment, as an Alien is, for *fit alienigena* by his Baniſhment, and he is in a worſe caſe than an Alien, becauſe he taketh with him *Indignatio principis*: But a baniſhed man forfeits neither Title of Honor, as Knighthood, which is *de jure gentium*, nor the Lands he had before he was Exiled, unleſs by ſpecial Judgment given in a legal courſe they be ſo decreed.

Fitz. abr.

Then our caſe goes farther, That *E.* is not Exiled himſelf, but *D.* his Father was Exiled, whoſe Heir *E.* is: now whether by the Exilement of the Father, the liberty and Freedom which *E.* might claim in the City of *Lincoln* by being the Son and Heir of a Freeman, be forfeit for his Father's Baniſhment, or not, is the matter of my caſe.

A Freeman of a City or Borough may be made divers manner of ways, as appeareth in the Caſe of the City of *London* in Sir *Edward Cook's* 8th *Report*, *fol.* 126. That is to ſay,

City of London's Caſe.

First,

First, By Service in his Apprentiſhip. 1.
Secondly, By Birth, by being the Son of a Freeman. 2.
Thirdly, By Purchaſe, and that is by the Common-council of the City: And at *Briſtol* by Marriage. 3.

In the Chronicles in the Reign of *Richard* the 2d it is ſaid, *Freedom was obtained but by two means*, videlicet, *By Service, and by Birth*; yet it ſeems it may be obtained by purchaſe, becauſe the Centurion claimed his Freedom thereby, in the 22d Chapter of the Acts of the Apoſtles. In the *Iriſh Reports*, *fol.* 12. it is ſaid, *That one may be a Freeman by Birth, Marriage and Service:* Saint *Paul* indeed was born at *Tarſus* in *Cicilia* which was under the obedience of the Romans, he challenged therefore to be a Citizen of *Rome*; but I take it the Text there took it but to be National Freedom, which is ſuch a general Freedom, as *Calvin* being born in *Scotland* claimed and had in *England*, becauſe he was born under the obedience of the King of *England*; But that made not St. *Paul* free of the private Cuſtoms, Privileges and Franchiſes of *Rome*, no more than *Calvin's* birth made him a free Citizen of *Lincoln* to the peculiar Cuſtoms of that City. *Acts* 22. 28. *Davy's Rep.* *Calvin's Caſe.*

If one be born in a City of Parents that are not free, the Child hereby is no Citizen by birth; and if one be born of free Parents out of the place of Privileges, as out of *Lincoln*, he yet is a Freeman by Birth; Yet in the Charter-Grant of *Yarmouth* the words were, *Conceſſimus Burgenſibus de Magna Yermutha de villa prediƈ' oriundis*, that they ſhould have ſuch liberties and ſuch; ſo that it may be the ſpecial words of the Charter may alter the caſe: yet in the caſe of the City of *London*, *Cook's* 8th *Report*, the King by his Letters Patents could not make one a Freeman of *London*, yet he may thereby make him a Freeman of the Kingdom. *Cook's* 8th *Report.*

But whether thoſe that are Free by Birth, Service or Mariage be Freemen within my Statute, or not, is a Queſtion: becauſe the words thereof be *abſolutè poſita* to all purpoſes; And therefore I take it, that this Statute intends it of ſuch as have

as have challenged their Freedom, and which have taken the Freeman's Oath, and are admitted into the Society and fellowship of the Freemen, Citizens and Burgesses; for in *James Bag's* Case in the 11th *Rep.* such a one is taken for a perfect Freeman, and no other: So in my opinion *E.* the son of *D.* is no competent Freeman of the City of *Lincoln* within the Branch of this Statute; But admit he were, then it may be objected to me, that by the Exilement of the Father the Freedom of the son was forfeit, by reason he was by this Exilement become no free Citizen. But in answer thereunto I say briefly, That if the son had attained this Freedom by the death of his Father, as a thing descendible, then it had been forfeit by his fathers Banishment, but the son had this Freedom by his own birth, as a purchase, and not by the death of his Father by descent, *Ergo*, it was not forfeited by his Fathers Exilement. Like to the case where *J. S.* hath many Children, and then he confesseth himself Villain to *J. D.* in a Court of Record, yet his Children formerly born are Freemen and no Villains, because they were free by their own births, but the Inheritance is inthralled, because it is to come to the Heir by descent: So that I am of opinion, that if *E.* had otherwise been a competent Freeman, as he was not, then the Exilement of his Father could not have disabled him.

James Bag's Case.

Our Freeman which this Statute speaketh of, must not onely be free of the City or Borough, but he must also there be resiant; for these words are materially placed in the said Law, and here *E.* was the son of *D.* a free Citizen of *Lincoln*, who did there reside and dwell, and every Child is part of the Father's family, for the Husband and Wife, Father and Children, Master and Servant are of a Family; and a Ward is part of his Gardians Family: But in our case when *D.* was Banished, he then forewent his local Habitation, and so his said son could not then be of his Family, nor could be intended to dwell with him who had no Habitation in the Realm: And I am of opinion, that this Statute requireth an actual Habitation or Resiancy,

and

and not a Mathematical or Imaginary Reſiancy, ſuch a one as was in *Jeffrey's* Caſe in *Cook's* 5th *Rep.*; for there the caſe was, *That one did perſonally and locally dwell and reſide at* Dale, *and occupied Lands in* Sale; here the party was in Law, but not in fact, an Inhabitant in *Sale*, and was there aſſeſſed as an Inhabitant to the repair of that Church; But this Commiſſioner of ours is bound to ſuch Reſiancy as a Miniſter is to his Reſiancy, which in *Butler* and *Goodale's* caſe in *Cook's Report* ought to be locally and perſonally abiding in the Pariſh where his Parſonage or Vicarage houſe is, for reſiancy or reſidency have a like ſignification, and be both of them words of that efficacy, as they tie a man to his perſonal and actual abode and habitation with his Family: But put the caſe that in *Lincoln* there be places exempt out of the Freedom of the City, and yet within the Circle of the Walls, as St. *Martins* doth in *London*, I take it if a Freeman dwell there, this is no reſiancy intended within this Statute, becauſe the words of our Law be, *That he be Reſiant and free of the City*, which going together draweth his Habitation to the place where his Freedom is: And with this agreeth the Decree made for *London* touching Tithes in *Anno Dom.* 1535. which did no extend to St. *Martins*, becauſe it was In but not Of *London*, Dr. *Graunt's* caſe, *Cook's* 11th *Rep.*

Jeffrey's Caſe.

Butler and *Goodale's* Caſe.

Dr. *Graunt's* Caſe.

Our Freeman muſt alſo have in clear moveable ſubſtance to the value of a hundred pounds; this word (*Subſtance*) would have extended as well to ones real Eſtate as to his perſonal, if it had gone alone; but being coupled with the word *Moveable*, declares plainly that it onely extends to the perſonal Eſtate: And I take it, that theſe words (*Moveable ſubſtance*) do not onely contain and extend to ſuch things *Quæ de ſe movere poſſint*, as live Goods, Horſes, Oxen, Sheep, and ſuch like, but alſo to ſuch things *quæ de ſe movere non poſſint*, as Plate, Jewels, ready Money, Utenſils of Houſe, Mercery, Drapery, and other Wares and Goods of value, Hay, Corn, Goods of Husbandry, and Houſewifery; but Birds and Beaſts of Parks and Warrens, and Doves in Dove-

Dovehouſes, be not valuable ſubſtance; a Hive of Bees, and a Villain for years, and a Captive taken in the Wars be, for there ſhall be paid for him a Ranſom, as is mentioned in the *Regiſter*, *f.* 102. Moneys due upon Statutes, Judgments, Recognizances, Bonds, Bills or Contracts, be not valueable ſubſtances within this Statute; for by this Statute it muſt be clear and not doubtfull or accidental, as Moneys out of hand be, which is like to a Bird in the Buſh; yet theſe be all valueable, and are valued in Inventories taken in the Eccleſiaſtical Courts: But yet the Executors or Adminiſtrators ſhall not be charged for aſſets for them, till they have received them: And in 25 *H.* 8. in *Dyer*, *fol.* 5. Obligations are not held valueable, but things in action; and if one have got Goods by tort and wrong to the value of One hundred pounds, yet this is clear valuable ſubſtance within this Law; for although the word *clear* be inſerted into the Statute, yet that relates to the value, and not to the Title of thoſe Goods: And if one have Goods as Executor or Adminiſtrator, theſe are not his own, and therefore do not inable him to be a Commiſſioner within this Law.

25 *H.* 8. *Dyer.*

Neither do the Goods of the Church inable the Parſon, Vicar or Curate, nor the Goods of a Corporation do not inable the Major and Aldermen, or Citizens of a City, or Town Corporate, for theſe do not belong to their particular perſons, neither did this ſtock in my Caſe, which is demiſed to *B.* and *C.* make them competent Commiſſioners within this Statute, becauſe they had not the property therein, but onely the uſe and occupation thereof.

And although in this Statute it is not declared in what place theſe goods which ſhould inable a man to be a Commiſſioner of Sewers ſhould be in, it will ſuffice if the party have them in any place within the Realm; for this very Law calls them *Moveable ſubſtance*: And herein I end my free Citizen, and in my opinion *B.* had neither Freedom in his perſon, nor real Eſtate in Land, nor moveable ſubſtance in any ſort to make him a competent Commiſſioner within this

this Law; yet if a Freeman be deſtitute of Goods, or want perfection in his Freedom, if notwithſtanding he have Lands to the value of forty Marks *per annum*, then he ſhall be allowed a Commiſſioner within this Statute: Touching which point of Lands I now intend to proceed in.

In the handling of this matter it is to be conſidered, which be Hereditaments within this Law; for the other two words *Lands* and *Tenements* need no expoſition; wherein I am of opinion, That Meſſuages, Cottages, Toſts, Croſts, Houſes, Land, Meadow, Paſture, Feedings, Moors, Mariſhes, Heaths, Furs, Mills, Orchards, Gardens, Hopyards, Rents, Annuities, *Prima veſtura terræ*, Piſcaries, Tythes, Penſions, Portions, Proxies, Parks, Warrens are all of them Hereditaments within this part of this Law, for the word *Hereditament* is a word of the larger ſize and largeſt extent in our Law, being *Omne quod Hereditari poteſt*; and yet every Hereditament is not within this Branch, for it hath two other words joined therewithall *(videlicet) yearly value*: And therefore Franchiſes and Liberties, as Waifs, Strayes, Felons Goods, Deodands, Fines, Amerciaments, Profits of Courts, Fairs, Markets, Ferries, Hundreds, Leets, and ſuch like, are all of them out of this Statute in this point, becauſe they be not of a certain yearly value, but be accidental and depend in contingency, by the opinion in *Butler* and *Baker*'s caſe *Butler and Baker's Caſe.* *Cook*'s 3d *Report*; But as it is there ſaid, *If theſe things have heretofore been uſually letten and demiſed for certain yearly Rents, then they may be Hereditaments of clear yearly value within this Law.* All Offices and Vocations, as Phyſicians, Chirurgions, or Trades, as Merchants, Mercers, Grocers, Drapers, and ſuch like, be neither Hereditary, nor of certain yearly value, and therefore they be not within this Law, though perhaps one gain thereby Five hundred pounds *per annum*. Alſo dry reverſions or remainders depending upon Eſtates for lives are out of this Branch, for the words of the Statute be *(having)* which is in *præſenti* and not *future*.

Neither is an Advowſon of force in this point, though it be aſſets in a Formedon, yet it is no aſſets in an Action of debt brought againſt Executors; Homages, Fealties, Eſcuages, Heriots, Reliefs, *Nomina penes*, and ſuch like, be Hereditaments; but becauſe they are not of yearly value, they are not therefore within this Law.

Alſo if a Commiſſioner of Sewers be ſeiſed of a Rent or Annuity payable every ſecond year, it doth not inable him to ſit becauſe it is not Annual, which is intended yearly, and every year, as the Prior of *Plymton's* Caſe in *Dyer*, *fol.* 123. is, but if one do grant to *J. S.* an Annuity or Rent of forty Marks in fee, payable at the Feaſt of *Eaſter* yearly, if the Grantee will then come for it to ſuch a Place, that is of certain yearly value within this Law. Dyer 123.

But put the caſe that *A.* is ſeiſed of Land in fee, and grant to *B.* forty Marks *per annum* for his life onely; I am of opinion that *B.* is no ſufficient qualified Commiſſioner within this Law.

But if *A.* be ſeiſed of a Rent of forty Marks *per annum* in fee, and he grant the ſame to *B.* for his life, he is a competent Commiſſioner within this Law: *differentia apparet.*

Our Statute goeth on in theſe words, *That the Commiſſioner which would ſit without exception, muſt have in Lands, Tenements or Hereditaments of the clear yearly value of forty Marks to his own uſe*; Therefore a Man ſeiſed of Lands to that value in the right of his Wife, although he take the Rents and Profits to his own uſe, yet this will not inable him to be a Commiſſioner within this Law, but he muſt have them *in ejus uſu & ad ejus uſum.*

A Feoffee to a uſe before the Statute of 27 *H.* 8. of Uſes, was no competent Commiſſioner within our Statute, for he had the Land then to another Man's uſe; Neither was *Ceſtuy que uſe* ſufficiently qualified to be a Commiſſioner.

Two Tenants in Common, or Coparceners of forty pounds Lands *per annum* are neither of them of ſufficient ability to be Commiſſioners within this Law.

And

And the like law is of two Jointenants of Land of that yearly value, for though they be ſeiſed *per my* and *per tout*, yet in truth, and in a legal conſtruction, either of them be ſeiſed but of a moiety: So that if two Jointenants, Tenants in Common, or Coparceners be ſeiſed of Lands of the yearly value of threeſcore pounds, either of them may ſit by this Commiſſion.

A Dean and Chapter, Major and Commonalty, Maſter of a College and Fellows, which be ſeiſed of Lands and Tenements of the yearly value of a hundred pounds *per annum*, are not in reſpect thereof to ſit.

If a Biſhop, Dean, Chancellor, Archdeacon, Prebend, Parſon or Vicar be ſeiſed of Lands in *Jure Eccleſiæ* of the clear yearly value of forty Marks, I ſuppoſe theſe may ſit Commiſſioners by this Statute, for they have theſe Lands in *eorum uſu* during the time they continue in their places, which in intendment of Law is for their lives; but yet by the intendment of Law they are not to ſit in the execution of any humane Affairs; and therefore ſeeing their Perſons are out of the intendment of this Law, ſo likewiſe ſhould their Church-livings be: but this is but a conceit, for although they be not Perſons *having* theſe Lands within the Statute of 32 *H.* 8. of Wills, which is a having to diſpoſe, yet they may be within our Statute, which is a having to retain. 32 *H.* 8.

If an Executor have a Villain for years which purchaſeth Land of forty Marks *per annum*, he may ſit in the execution of this Commiſſion, for till his Lord enter he hath them to his own uſe; but if the Executor enter, then neither the Villain nor Executor can ſit a Commiſſioner by this Law.

If an Alien purchaſe Lands of ſufficient value in fee, he in reſpect of his Perſon is a diſabled Perſon to ſit, neither is he a Perſon having Lands, becauſe he is not ſeiſed thereof to his own uſe, but to the uſe of the King; But if he be made a Denizen, then in his perſon he is made capable.

The Warden of the Fleet who hath Lands belonging to his Office, may in respect thereof sit a Commissioner by this Law.

But shall a Termor or Lessee for years of Land of good value be thrust out of Commission, and be counted neither a sufficient Landed man, nor his term and lease to be accepted moveable substance, and not onely so, but that his Farm shall be a farther disablement unto him, as the Statute of 13 El. cap. 9. seemeth to purport; the words of which Statute be, *That no Farmer or Farmers for term of years, of any Manors, Lands or Tenements, lying or being within the Precincts or Limits of any such Commission of Sewers, which be or which hereafter may be ordered and chargeable by any Laws, Ordinances and Constitutions made or to be made by virtue of any such Commission wherein he or they shall be named or appointed Commissioner or Commissioners, not having Estate in Freehold within the Realm, of or in Manors, Lands or Tenements of the yearly value of forty pounds, shall any time hereafter have power to sit, or in any-wise intermeddle with the execution of such Commission or Commissions, during the time he or they shall continue or be such Farmer or Farmers of any such Manor, Lands and Tenements, and shall not have Estate of Freehold as aforesaid; but that every such Commission, having respect onely to every such Person or Persons for such and so long time as he or they shall be or continue Farmer or Farmers of any such Manors, Lands or Tenements, shall be deemed and judged in Law as void.*

13 Eliz. 9.

But yet in the closing up of that Statute of 13 *Eliz.* there is a Proviso to this effect, *Provided always, that it shall be lawfull for any Commissioner, being also a Farmer, and not having Lands or Tenements to the clear yearly value of forty pounds of Freehold, to sit by virtue of the said Commission, and have his voice and full authority with others to make and establish Ordinances for Sewers, according to the Tenor of the Commission touching and concerning all Lands and Tenements within the Precinct of every such Commission, other than such Lands and Tenements as he or they for the time hold and*

enjoy

enjoy as Farmer, as he or they might have done before the making of that Statute; but he could not have ſitten in execution of this Commiſſion before the making of this Statute, unleſs he had beſides his leaſe Lands to the value of forty Marks *per annum*: And therefore a leaſe for years is no inablement at all, but a diſablement, as this Statute declares.

But the times when this having of Lands, &c. will ſuffice to qualify a Commiſſioner to ſit within this Law, is now to be conſidered of, wherein I am of opinion, that the *When having* muſt be referred to the *Then ſitting*: For the words of the Statute be, *That none take upon him to ſit, not having Lands to the yearly value of forty Marks*; ſo that if he have not Lands of that value when he is firſt made a Commiſſioner, yet if he have ſo much when he ſitteth upon the Commiſſion, it will ſatisfy this Law; and if once he have Land of that value and ſitteth, and after ſell the Land away, or if they be evicted from him, he is then diſabled to ſit as a Commiſſioner by this Statute: And ſo if he were but Tenant for the life of *J. S.* and *J. S.* dieth, he ought not to ſit: In 12 *H.* 7. 4. a Juror which was to paſs upon trial of Land was to have forty ſhillings *per annum* of Freehold, and after he was impanelled, and before he was ſworn, he ſold away his Land, and when he came to be ſworn, he was challenged for want of Freehold, but the challenge was diſallow'd, for after he was impanelled, his Land (though after ſold away) was chargeable with the Iſſues which he after might loſe in that matter; and with this agreeth 14 *H.* 7. 2. by *Frowick*: But our Statute is more preciſely penned, which is, *That none do preſume to ſit, unleſs he have Lands of that value, or be*, &c. therefore when he ſits he muſt have the Lands. 12 *H.* 7. 4. 14 *H.* 7. 2.

And if *A.* do bargain and ſell his Lands to *B.* by Deed intended of that value, and before the inrollment of the Deed *B.* do ſit as Commiſſioner, and after the Deed is inrolled, yet this doth not qualify his offence, and the relation of the working of this Deed doth not aſſiſt him to take off the penalty of this Law.

Alſo

Alſo a man diſſeiſed is during the Diſſeiſin diſabled to ſit, for he had not then power to deviſe the Lands by the Statute of 32 *H.* 8. of Wills, for that Statute doth as ours doth, uſe the word *Having* in *preſenti*, and not in *future*.

32 *H.* 8.

And thus much I thought convenient upon this occaſion to deliver my opinion, when the Commiſſioner muſt have Lands of forty Marks *per annum*, to inable him to ſit as a Commiſſioner within this Statute.

To treat of the utter Bariſter I need not, for when he hath taken the Oath mentioned in the Statute, he is an abſolute and compleat Commiſſioner within this Law, to all purpoſes, although he have neither Lands or Goods, according as the Statute appointeth others to have.

It is enacted likewiſe by this Statute of 23 *H.* 8. 5. that if any Perſon not qualified as aforeſaid, do ſit by virtue of the Commiſſion of Sewers, he ſhall forfeit forty pounds for every time that he ſhall attempt ſo to doe, the one half thereof to be to our Sovereign Lord the King, and the other half thereof to the uſe of him or them, that will ſue therefore by action of debt, bill, plaint or information, in any of the King's Courts, in which action or ſuit no wager of Law ſhall be admitted, nor any eſſoin or protection ſhall be allowed.

In this caſe when the Perſon who ſits contrary to the Statute hath forfeited one forty pounds, he may forfeit another forty pounds for ſitting a ſecond time, though there be no conviction of him for that firſt time, becauſe the penalty is equal and alike for every offence: But otherwiſe it is where there are ſteps or gradations

dations in a penal Law; to double or increaſe the penalty; for there he muſt be convicted for the firſt offence, before he can forfeit any thing for the ſecond offence, which prior conviction not being neceſſary here, the Party who ſits two ſeveral times by virtue of this Commiſſion, may be ſued for the whole eighty pounds together, and the like for as many more times as he ſhall ſit, not being qualified, as the Act requires.

By the Statute of 18 *Eliz. cap.* 5. It is enacted, That none ſhall be admitted or received to purſue againſt any Perſon, upon any penal Statute, but by way of information, or original action, and not otherwiſe: See *Co.* 6. 19, 20. *Moor* 412. *caſe* 565. and 600. *caſe* 827. *Cro. Hil.* 39 *Eliz.* 544. And no Proſecutor *Qui tam, &c.* can now ſue by Bill upon any Statute precedent to that of 18 *Eliz.* as was reſolved in *Woodſon* and *Clarke's* Caſe, in a popular ſuit brought by Bill in the *King's Bench* upon the Statute of 23 *H.* 6. *cap.* 10. of Sheriff's, *Co.* 3. *Inſt.* 194. and in *Udeſon* and the Mayor of *Nottingham's* Caſe, *Moor* 248. *caſe* 390. contrary to the opinion in *Style* 381, 382. So that although this Statute of 23 *H.* 8. 5. gives the Proſecutor power to ſue by Bill, yet that is taken away by 18 *Eliz.* 5. and he can ſue by way of information or original action onely.

18 *Eliz.* 5. *Co.* 6. 19, 20. *Moor* 412. 600. *Cro. El.* 544. 23 *H.* 6. 10. 3 *Inſt.* 194. *Moor* 248. *Style* 381, 382.

The Informer or Proſecutor who ſues a Commiſſioner (not qualified) upon this Statute for the

the forty pounds muſt begin his ſuit within one year after the offence committed, otherwiſe he ſhall not have any part of the penalty; For the 31 *Eliz.* 5. Statute of 31 *Eliz.* 5. reſtrains the Proſecutor, *Qui tam, &c.* upon all penal Laws (except the Statute of Tillage) to that time: But if he doth not proſecute within a year after the offence, yet the King may at any time within two years after that year ended: And therefore it was reſolved, *Hil.* 12 *Jac.* That where an Information was brought in the Court of Exchequer, *tam pro Domino Rege quam pro ſeipſo* upon the Statute of 3 *Jac. cap.* 4. for three years forbearance to receive the Sacrament, although it was not good for the Informer, yet it was well enough as to *Cro. Jac.* 168. the King, *Cro. Jac.* 166. *Syvedale verſus* Sir *Edward Lenthall.*

By the King's Courts, The four ordinary Courts at *Weſtminſter* ſeem to be here onely intended; For they are the King's general Courts, where the King's Attorney may acknowledge or deny: And the words of this Statute being general (*ſcil.* in any of the King's Courts) are left to the conſtruction of Law, where the Rule is, *verba æquivoca, & in dubio poſita intelliguntur in digniori & potentiori ſenſu:* And in this ſenſe ſhall theſe words (the King's Courts) be conſtrued in all penal Statutes where the penalty is *Jones* 193. to be recovered in a popular ſuit, *Jones* 193.

Co. 6.

Co. 6. 19, 20. *Moor* 421. *case* 581. *Cro. Mich.* 4 *Car.* 146. *Cro. Trin.* 4 *Car.* 112, 113. *Hutton* 99. so that the Commiſſioner, who ſits by virtue of the Commiſſion of Sewers, without being qualified, can be ſued onely in thoſe Courts for the forty pounds, and not in any inferior Court.

Co. 6. 19. 20. *Moor* 421. *Cro. Car.* 146. 112, 113. *Hutton* 99.

And, as it ſeems, the Commiſſioner ſo ſitting contrary to this Act cannot be indicted for ſuch offence; For it hath been held for Law, that when a Statute appoints a penalty for the doing of a thing which was no offence before, and appoints how it ſhall be recovered, it ſhall be puniſhed by that means, and not by indictment; and ſo it was reſolved in the Caſe of *Innocent Caſtle*, who was indicted for acting as a Juſtice of Peace, not having Lands to the value required by the Statute of 18 *H.* 6. *cap.* 11. but was diſcharged of the Indictment, for that the Statute had preſcribed another way of puniſhment, *viz.* by an Action of Debt, *tam pro Domino Rege, &c. Cro. Mich.* 20 *Jac.* 643. And conſonant to this was the opinion of all the Judges of *England*, ſave three, *Mich.* 6 & 7 *Eliz. Dyer* 236. And yet ſee *Croſton's* Caſe in *Modern Reports* 34. where there is related an opinion of two Juſtices to the contrary, and that the Party may in ſuch caſe be puniſhed by Indictment.

18 *H.* 6. 11.

Cro. Jac. 643.

6 & 7 *Eliz. Dyer* 236.

Modern Reports 34.

The Second question.

The second question in my case touching this Statute, is, Whether the Countess of *Warwick* be a compatible Commissioner within this Statute.

Although it is uncouth in our Law to have Women Justices and Commissioners, and to sit in places of Judicature, yet by the Authorities ensuing you shall find this a point worth insisting upon, both in Humane and in Divine learning; for in *Genesis*, Chapter the first, after the Creation Gen. cap. 1. of all other Creatures being finished, the Heavens adorned, and the Earth replenished, God said, *Let us make man in our own Image, after our likeness, and let him have dominion over the fish of the Sea, and over all the Earth, and every creeping thing that creepeth upon the Earth: So God created man in his own Image, in the Image of God created he him, Male and Female created he them; and said unto them, Be fruitfull and multiply, and replenish the Earth, and subdue it, and have dominion over the fish of the Sea, and over the fowl of Heaven, and over every living thing that moveth upon the Earth.* This was the first Commission that ever was granted, and it passed under the divine immediate Seal of the Almighty, and extended over the whole world; and by the virtue of the word *Dominamini* in the Plural number, God coupled the Woman in Commission with the Man. But in the Exodus 18. 18th Chapter of *Exodus*, Ver. 21. *Jethro* adviseth and counselleth *Moses* his son in law *to provide out of all the people men of truth, hating covetousness, and place such over them to be Rulers of Thousands, Rulers of Hundreds and over Fifties and Tens*; where by the word *Men* twice repeated by *Jethro*, this place of Scripture seemed to exclude Women wholly from Government, and the former Commission extended over Fishes, Birds and Beasts, and neither over men nor women: And in the first of the *Corinthians*, Chapter 14. it is 1 Cor. 14. said by St. *Paul*, *Let the women keep silence in the Churches, for it is not permitted to them to speak.* And in *Grendon's* case in the *Comment. fol.* 497. *Dyer* saith, *That women could not administer the Sacraments, nor were they permitted*

mitted to say Divine Service. And in the second Chapter of *Timothy*, V. 12, he saith, *We suffer not the woman to rule over the man*; but this last of *Timothy* may be most aptly applyed to husband and wife. 1 Tim. 2.

I remember out of the Abbey Book of *Evesham* this Note worthy of observation, *Quod Alicia Peerez Regis minens supra modum militum nimis supergressa, sui etiam sexus & fragilitatis feminini Immemor, nunc Justiciarios Regis, nunc in foro ecclesiastico juxta doctores sedenda, & pro defensione causarum suadere & etiam contra jus postulare minime verebatur, unde propter scandalum petierunt a rege in Parliament' tent' An. 30 Ed. 3. penitus amoveri*; but hereby I collect, that she was not in Commission with the Judges Temporal or Spiritual, but was a favorite of the King's, and took upon her to intermeddle in businesses nothing concerning her: But whether the Text meant it, for a Woman to sit Judge in a Court of Justice, was *contra modum mulierum*, or because she sate there to wrest righteous Judgment, I refer to the Readers of that History; For *Debora* was Judge of *Israel*, and Judged the people as the fourth of *Judges* hath it. *Dyer* indeed saith in *Grendon's* case, *That divers Churches were appropriated to Prioresses and Nonnaries, whereof women were the Governesses*; whereby and by the said Chapter of the *Corinthians* it appears, that women might be admitted to have Rule and Government over the possessions and persons Temporal and Ecclesiastical, but were not admitted to have *curam animarum*, nor to meddle with the Administration of the Service or Sacraments. Judges 4.

And for Temporal Governments, I have observed women to have from time to time been admitted to the highest places; For in ancient Roman Histories I find *Eudochia* and *Theodora* admitted at several times into the sole Government of the Empire: and here in *England* our late famous Queen *Elizabeth* whose Government was most renowned: And *Semiramis* governed *Syria*: and the Queen of the South which came to visit *Soloman*, for any thing that appears

peers to the contrary, was a ſole Queen: And to fall a degree lower, we have preſidents that King *Richard* the firſt, and King *Henry* the fifth appointed and deputed by Commiſſions their Mothers to be Regents of this Realm in their abſence in *France*: And the wiſe and renowned Lady *Margaret* Counteſs of *Richmond* was put in Commiſſion, and *Humfrey de Bohun* Earl of *Hereford* was by Tenure Conſtable of *England*, which is a Judge in Martial affairs, and he died without iſſue Male, by reaſon whereof the Office (amongſt other things) deſcended to his two Daughters and Co-heirs: And in the 11 of *Elizabeth*, in *Dyer*, it is holden for Law, That although this was an Office of Juſtice, yet they might execute the ſame by deputy; for in truth women were unfit Martialiſts to judge of matters of that nature; and yet it is clear, a deputy doth nothing in his own name, but in the name of his Maſter or Miſtreſs, therefore the Martial Court was to be kept in their names: But yet I will deſcend a ſtep lower; It was adjudg'd in *B. R.* 5 *Car.* 1. That the Office of Marſhal of that Court well deſcended to a *Feme*, and that ſhe might execute it by her Deputy; See *Hern's* Reading 4. And doth not our Law temporal and ſpiritual admit of women to be Executrixes and Adminiſtratrixes? and thereby they have the rule or ordering of great Eſtates, and many times they are Gardianeſſes in Chivalry, and have thereby alſo the Government of many great Heirs in the Kingdom, and of their Eſtates.

11 *Eliz. Dyer.*

10 *H.* 7. And in 10 *H.* 7. a man deviſed his Lands to be ſold by a woman, and died, and ſhe ſold the ſame to her husband: So by theſe caſes it appeareth, that the Commonlaw of this Kingdom ſubmitted and committed many things to their Government; yet the Statute of Juſtices of the Peace is like to *Jethro's* counſel to *Moſes*, for there they ſpeak of men to be Juſtices, and ſeemeth thereby to exclude women; But our Statute of Sewers is, *Commiſſion of Sewers ſhall be granted by the King to ſuch perſon and perſons as the ſaid*

Lords

Lords should appoint; So the word *persons* stands indifferently for either Sex; And therefore although by the weakness of their Sex they are unfit to travel, and they be for the most part uncapable of learning to direct in matters of Judicature, for which causes they have been discreetly spared, yet I am of opinion, for the authorities, reasons and causes aforesaid, that this honorable Countess being put into Commission of the Sewers, the same is warrantable by the Laws, and the Ordinances and Decrees of Sewers made by her and the other Commissioners of Sewers, are not to be impeached for that cause of her Sex.

And I conclude here, that although in discretion women have been secluded as unfit, yet they are not in Law to be excluded as uncapable.

If an Infant above the age of Fourteen, and under the age of One and twenty be made a Commissioner, his Infancy shall be no cause to disable the Laws made by him; young *Daniel* was Judge over both the Elders. And in Little *Brook, fol.* The case is, a Parson or Prebendary being within age made a Lease for years of his Benefice, and would but could not after avoid it for his Nonage, for seeing the Church had made him of full age to discharge the spiritual Office, our Commonlaw thought it fit to inable him to dispose of his Temporalties: and in 21 *H.* 7. *fol.* 12. and 13. the case is put by *Bridges*, and confirmed by Justice *Syliard*, and was not denied by any, that an Obligation made by a Major and Commonalty, Dean and Chapter, Abbot and Covent, shall not be avoided for the Nonage of the Major, Dean or Abbot; yet all these serve in place of Government, howbeit in the said matters their Nonages shall not impeach them: And in the third of *Isaiah* it is said, *I will give them Children to their Princes, and Babes to rule over them*; noting thereby an unfitness in them to govern, but that debarred them not of the place: and of this matter this shall suffice. 21 *H.* 7. — Isa. 3. —

But now admit, as oftentimes it falls out, that Commissioners shall sit in the execution of this Commission of Sewers,

en, which have not taken the Oath, which have not Lands of value, or which is not a free Citizen, and yet there be Ordinances, Decrees and Laws made at those times; Now whether those Laws and Ordinances so made by a disabled Commissioner be void or not, is the question; or whether the disabled Commissioner shall onely undergo the penalty of forty pounds.

6 H. 8. There was a Statute made in 6 *H. 8. cap.* 10. whereby it was enacted, *That the Chancellor of* England *for the time being should make no Commission to any Person or Persons (except he had Lands and Tenements of Estate of Freehold to the yearly value of twenty pounds, or else be Justice of the Quorum) within any of the Shires where he should be made a Commissioner; and if any such Commission were directed to any Person or Persons not having Lands or Tenements to the yearly value of twenty pounds, or not being one of the Justices learned of the Quorum, as aforesaid, That then every such Commission, and all Presentments and Accusations had and presented before any such Commissioners, be utterly void and of none effect.*

But this Statute is in time expired long ago, and therefore it is no interruption to our Commissioner; for although the Statute of 23 *H. 8.* which I read on hath a Clause in it in effect, *That all and every Statute and Ordinance heretofore made concerning the Premisses, made in the time of the said King, or of any of his Progenitors, not being contrary to that Statute, should stand in force*; yet these words do not set on foot a Statute expired in time, as that of 6 *H. 8.* is: Also in the said Statute of 13 *Eliz.* If a Termor or Lessee for years be in Commission, all Laws made which concern Lands whereof he is a Farmer are void as to him, *vide antea.*

23 H. 8. But to relie on our Statute of 23 *H. 8.* in my opinion it doth not avoid any of the Laws and Ordinances made by disabled Commissioners, but doth onely inflict the punishment and penalty of Forty pounds a piece upon every of them, for every time they or any of them shall sit in or about

bout the execution of this Commission; yet it seemed in the case *de Jure Regis Ecclesiastico*, That whereas the Statute of first of *Elizabeth* authorized the Queen to grant Commissions to natural born Subjects, that if she had granted the same to an Alien, the acts done by him had been void.

Case de Jure Regis Ecclesiastico.

But now my case proceeds to the next point or step, and that is touching the Law and Ordinance made to rase the said Were; I inserted this clause in my case, because I had not formerly occasion or fit opportunity to treat of the Lets, Impediments and Annoyances which be contained within this Statute of 23 *H.* 8. and therefore I took this occasion to close up this daies Exercise with the Discourse of them.

These by name are such Impediments and Annoiances as this Statute speaketh of,	1. Streams. 2. Mills. 3. Bridges 4. Ponds. 5. Fishgarths. 6. Mildams. 7. Locks. 8. Hebbingweres. 9. Hecks, and 10. Floudgates.	And the rest must be comprised within these general words (*videlicet*) *Other like Lets and Impediments.*

And the discourse upon all these will rest most upon the Statutes heretofore made touching the same.

And the first Statute thereof made is in *Magna Charta*, *cap.* 23. *Omnes kidelli deponantur de cetero penitus per Thamesiam & Medweyan & per totam Angliam nisi per costeram maris*; what this word *kidellum* signifieth appeareth by the title of that Statute, which is Weres.

Magn. Chart. cap. 23. This extends not to the King's, *Keddels per Kelle* in 13 *H.* 7. 35. 25 *Ed.* 3.

The next Statute to this is, 25 *Ed.* 3. *cap.* 4. which doth enact, *That all Mills, Weres, Stanks, Stakes and Kiddels which were levied and set in the time of King* Edward (that King's Grandfather) *and after, whereby Ships and Boats were disturbed,*

stopped, that they might not passe the Rivers as they were wont, should be cut and pulled down without being relevied.

The said first Statute is general, that all Weres should be put down but by the Seacoasts, yet this word (*All*) are intended of such onely as were erected without lawfull Warrant; and the said Statute of 25 *Ed.* 3. doth explain the generality of the said former Statute; For thereby it appears, That Weres erected in Navigable Rivers where Ships and Boats were wont to sail, should be extirped, because they were a hinderance to Navigation; but this extends onely to navigable Streams which have been navigable by use and custome; and it is manifest by this Statute, that these Weres which were so to be put down, must be onely such as were erected in the time of *Edward* the First, and sithence, because those seemed to be erected without lawfull authority; and being but erected in those times, they had not the countenance of custome and prescription to strengthen them.

The next Statute in time is that of 45 *Ed.* 3. *cap.* 2. which confirms the said Statute of 25 *Ed.* 3. and then adding thereto, that if any such annoiance be done, it shall be pulled down; and that he which shall relevy such annoiance, and he thereof duly attainted, he shall incur the penalty of one hundred Marks to the King, to be levied by the Estreats of the Exchequer; and the penalty is thereby given for the inhauncing of such Weres, Mills, Stanks, Stakes and Kiddels: This Statute is in part a confirmation of the said Statute of 25 *Ed.* 3. and in other part thereof it is a new Act in these Points.

45 *Ed.* 3.

1. First, In the forfeiture of a hundred Marks.

2. Secondly, This is the first Statute in my opinion made against inhauncing of such things which are counted annoyances.

3. And thirdly, It gives the like penalty against him which shall relevy the annoyance, as against the Inhauncer: And because this Statute depends upon the said Statute of 25 *Ed.* 3. it extendeth therefore but to navigable Streams.

The

The Statute of 1 H. 4. *cap.* 12. is a Statute in these Points of great consequence, and it doth also confirm the said two former Statutes of *Ed.* 3. and doth thereto also make additions in these insuing Points:

First, That Justices should be assigned to survey and keep the Waters and great Rivers, and to correct and amend the defaults, as well by survey, advice and discretion, as by inquest. 1.

Secondly, To survey the Weres, Mills, Stanks, Stakes and Kiddels in old time made and levied before the time of *Ed.* the First, and them which they should find too much inhaunced or straitned, to correct, pull down and amend; having always a reasonable substance of Weres, Mills, Stanks, Stakes and Kiddels so in old time made and levied. 2.

Thirdly, And if any such annoyances of Weres, Mills, Stanks, Stakes and Kiddels of Pelliges, and straitning in old time made and levied, be adjudged and awarded by the said Justices to be pulled down and amended, he that hath the Freehold of the same shall make thereof execution at his own costs within half a year after notification thereof made, upon pein of a hundred Marks; and he which shall relevy, or inhaunce or straiten them against the said judgment, shall forfeit one hundred Marks to the King, to be paid into the Exchequer. 3.

Fourthly, And he which shall find himself grieved by execution or otherwise in this behalf against right and reason, he may pursue and have right. 4.

First, by this Statute I collect these matters; First if that a Were, Mill, Stank, Stake or Kiddel be newly or of late years built and erected in any Streams without warrant or lawfull authority, the same may be caused to be pulled down by Order of the Commissioners of Sewers, at the costs of the Party which erected the same. 1.

Secondly, If Weres, Mills, Stanks, Stakes or Kiddels have stood and been time out of memory in Rivers or Streams, and so have warrant from custome and prescription, 2.

tion, these may not be cut up or pulled down by the Commissioners of Sewers, because long use and custome, which is a Law of this Kingdom, hath established them.

3. Thirdly, If there have been Weres, Mills, Stanks, Stakes or Kiddels time out of memory in Rivers or Streams, which of late years have been inhanced, inlarged, or otherwise exceeded the ancient size and accustomed compass, the excess in those cases is onely to be abated and pulled down; but so far as the ancient use did extend so it not to be impeached: For the words of the said Statute be, *That there be reserved always the reasonable substance thereof in old times accustomed.*

And in my opinion the generality of the said Statute of *Magna Charta, cap.* 23. is restrained by the succeeding Statutes, if the exposition should have been as large as the letter is.

5. And these three distinctions do fully declare the true effect of the said preceding Statutes.

4 H. 4. Then next in order of time is the Statute of 4 *H.* 4. *c.* 12. which reciteth, *That by Weres, Stakes and Kiddels in the water of Thames, and in other great Rivers through the Realm, the common passage of Ships and Boats be disturbed, and much People perished; and also the young fry of Fish destroyed, and against reason wasted and given to Swine to eat.* Therefore this Statute enacts, *That all former Statutes thereof made be holden, kept and put in execution.*

4. Here be two things which none of the former Statutes took order for;

1. The one is the perishing of the King's People;

2. The other the destroying of the fry of Fish which were occasioned by the erecting of these Weres, Mills, &c. Yet these are businesses which are otherwise provided for, and be not pertinent to these Laws of Sewers; And therefore I shall pass them over without any other farther explanation thereof.

12 Ed. 4. The Statute of 12 *E.* 4. *cap.* 7. doth confirm all the said former Statutes made against Lets, Impediments and Annoyances;

noyances; And doth farther enact, *That if contrary to the award, rule or judgment of the Commissioners made according to the Statute of 1 H. 4. it be found, that any Weres, Fishgarths, Mills, Milldams, Locks, Hebbingweres, Stakes, Kiddels, Hecks or Floudgates be made, levied, inhanced, straitned or inlarged against the said Statute, the Offenders therein contrary to the aforesaid award, rule and judgment being warned by the Sheriff or Under-sheriff of the County upon a* Scire facias *to that purpose directed where those Annoyances be, and within three months after such garnishment do not wholly amend, break down and avoid the said making, levying and inhancing, straitning or inlarging, That the Party being defective in that behalf shall forfeit one hundred Marks to the King, to be levied by Estreats out of the Exchequer; and if the Offender, his Heirs, Assignes or Assigns, or any of them do defer or continue the same default, contrary to the award, rule and judgment of the Commissioners, he or they shall forfeit one hundred Marks, the one moiety to the King, the other moiety to the Party that will sue for the same.*

And also it was further enacted, *That if any Person or Persons, other than such against whom such award, rule or judgment was made, or any of them, do presume to occupy or continue any of the Weres, Fishgarths and Impediments aforesaid, or other Incumbrances, he shall forfeit for every default for every month one hundred Marks, the one half to the King, the other half to the Party that will sue.*

It appeareth that this Statute speaketh of Milldams, Locks, Hebbingweres, Hecks and Floudgates, which the other Statute never speaketh of; so in extent thereof it hath more inlargment: And in my opinion all the foresaid Statutes did extend onely to navigable Streams and Rivers, with Ships and Boats.

If a Lessee for years of Lands or Tenements where any such Nusance or Annoyance is doth continue it, he is within the latter clause of this

Statute, though it was erected before his time; For a Lessee for years may lawfully abate any such Nusance, as was resolved in the Case of *Brent* and *Haddon*, *Cro. Mich.* 17 *Jac.* 555. And may be punished for the continuance of it, *Leonard* 2. 103. *Washbourn versus Mordant.*

Cro. Jac. 555.

Leon. 2. 103.

In the Tenth *Report* of Sir *Edward Cook*, the case of *Chester* Mills upon the River of *Dee*, was as insueth, *That a Causey or Milstank of Stone in the River of* Dee, *in the City of* Chester, *was made and erected for the necessary maintenance of certain Mills, some of the Kings, others of the Subjects, which stood at the end of the Causey*; were of late by the Decree of the Commissioners of Sewers ordered, That a breach therein of Ten Roods or Pearches should be made, which Causey or Milstank was by the agreement of all parties erected before the time of *Ed.* the first, and so had continuance without any inhauncing or exaltation: And whether this Decree was warranted by any of the said Statutes or not, was the question, which was referred by the Lords of the Counsel to the two Chief Justices, *Fleming* and *Cook*, and to *Tanfield* the Lord Chief Baron, to be considered on; and the said Chief Justices and Chief Baron declared their opinion, That the said Decree was not warranted by any of the said Statutes; for they said that the two Statutes of 25 *Ed.* 3. and 45 *Ed.* 3. extended but to such Impediments as were set up and erected in the time of *Ed.* 1. and after; and that the generality of the Statute of *Mag. Char. ca.* 23. was restrained by these two Statutes; And that the Statute of 1 *H.* 4. extended to such Weres, Kiddels, *&c.* and other Lets as were erected before the Reign of King *Ed.* the first, and which have been inhaunced and exalted sithence, and so was out of all those Laws, because there was no such inhauncing.

And the Statute of 23 *H.* 8. which I now read on, did not alter the former Statutes in these points; But provided,

That

That all and every Statute, Act and Ordinance heretofore made concerning the Premiſſes in that Act recited, not being contrary nor before then repealed, ſhould ſtand then in force: But the ſaid Judges did hold opinion, that all the ſaid Statutes ſtood unrepealed, and accordingly made their Report to the Lords of the Council.

The Commiſſioners of Sewers ordered that *J. S.* who had a certain Mill ſhould make the holes of his Floudgates of a leſs ſize, than they were before; and the order being removed by *Certiorari* into the King's Bench, it was moved to be quaſhed, for that 1. It did not appear by the order, what Eſtate *J. S.* had in the Mill. But the Court held it to be well enough, for that every one who is owner of a Mill, ought to repair the Floudgates, whatever Eſtate he hath in the Mill. 2. Another objection was, that the Commiſſioners had no power to make any ſuch alteration in an ancient Mill, as this ſhall be preſumed to be; and it doth not appear that there hath been any inlarging of the Floudgates ſince the Mill was firſt erected. But it was anſwered by the Court, that it ſhall not be intended to be a Mill before the time of *E.* 1. and if it were not, the Commiſſioners had power to ſtraiten or inlarge the Floudgates, according to the caſe of *Cheſter* Mills, and the Court confirmed the order, as to that Point. *Sidenfin* 1. *Sidenf.* 1. 145. 145.

There be many private Statutes made for the abating private Weres in ſome Streams which are not within my intent

now

an recite, farther than by naming of them, because I take it they are not confirmed by the Statute I read on; As 12 *H.* 7. cap. 7. *Southampton*; 14 *H.* 8. cap. 13. 23 *H.* 8. cap. 18. *Haven*; 25 *H.* 8. Cap. 7. *for killing Fry of Salmons*; 27 *H.* 8. *Rasta Haven*; 9, 10, 11.

In 19 *Jacobi Regis* there was a great Cause depending in the Court of the Dutchy at *Westminster*, between *Benedict Hall* Esq; Plaintiff, and *John Mason*, *George Warrel*, and *Thomas Powel*, Defendants; which was in effect as followeth: *That Queen Mary was seised of the Manor of* Monmouth, *with the Appurtenances in that County, and of a Free fishing in the River of* Wye, *and of a Were and a Fish-yard there, which were erected in the time of the said Queen, in the place where an old Foundation of an ancient Were did stand.* This Were had been letten by the said Queen, and also by Queen *Elizabeth* under the Seal of the said Dutchy by yearly Rents, and so there were ancient Presidents shewn in that Court, whereby it appeared, that the ancient Were there had been letten to Farm by the Earls and Dukes of *Lancaster*, and by the Kings and Dukes for a long time for yearly Rents: So that it was manifest that it was an ancient Were time out of memory: And this Were and Fish-yard, and the profits of fishing were letten by the King's Majesty that now is under the Seal of the Dutchy of *Lancaster*, in the Tenth year of his Reign, to one *John Abrahall* Esquire, for One and Thirty years, for and under the yearly Rent of Six Pounds thirteen Shillings and four pence paiable to his Majesty his Heirs and Successors; And the said *Abrahall* being so thereof possessed, did afterwards in the Tenth year assign the same to one *William Hall*, Esq; by reason whereof the said *William Hall* was thereof possessed; and in the 12th year of this King, made his last Will and Testament, and did thereby ordain the complainant his Executor, and after died; by and after whose decease the Complainant came to be possessed of the said Lease and Term therein to come; and in the Nineteenth *Jacobi Regis*, the Commissioners of Sewers in those parts caused a Jury to be impanelled and sworn,

sworn, touching this Weare and Fish-yard and gave therein a Verdict to this effect; that is, That Benedict Hall the Complainant was possessed of the said Weare, called Monmouth Weare, upon the River of Wye, which was excessive high and hurtfull, and was an Impediment to the common passage of Boats, Barks and Ballengers up and down the said River, and by means thereof they could not pass but in great danger, which if the said Weare were not, Boats of two or three Tuns might pass the River; and that the said Weare had been the death and drowning of one of the King's Subjects, and to the cause of the scarcity, dearnesse and want of Salmons, and other Fish within the said River, by reason many of them were taken in Gins of the said Weare, when they were out of season, and that the same was a great abuse, wrong, nuisance and annoyance to the whole Country.

Whereupon the said Commissioners made an Ordinance or Decree, setting forth thereby in effect as follows: That whereas it did appear to them, as well by the Examination of Witnesses, as by the said Verdict of the Jurors, and by their view, that the said Weare was a great Let and hindrance to the common passage of Boats and Ballengers up and down the River, endangering of the lives of the King's Subjects, and to the destruction of Fish, as the Salmon and Fry thereof; They therefore ordered, That the said Weare should be thrown down, and that the Timber and Stone thereof should be removed, whereby the Chanel should be cleared for passage of Boats; And accordingly did direct their Warrant under their Hands and Seals to the Defendants, authorizing them thereby to overthrow the said Weare, which they performed accordingly; and all this matter of the verdict of the Jury, and Decree of the Commissioners, were set forth at large in the Defendant's Answer; and after examination and publication of Witnesses, the Cause came to be heard in the said Dutchy-court before Sir *Humphrey May*, Knight, Chancellor of the Dutchy, Sir *John Denham*, Knight, one of his Highness's Barons of the Exchequer, an Assistant to that Court, and Sir *Tho. Chamberlain*, Knight, one of the

King's

King's Justices of his Bench, another Assistant of the said Court, and Sir *Edward Mosley*, Knight, Attorney of the said Court, who were of opinion, That the said Were being an ancient Were by prescription and custome, it ought not to have been overthrown by the Decree of the Commissioners of Sewers, and that the said verdict of the Jurors was defective, because though they presented the said Were to be over high and inhaunced, yet in regard they did not present in *quanto* nor in *qua parte*, the said Were was inhaunced above the ancient assize, therefore they esteemed the said Verdict of no validity.

But now it comes next in time and turn to declare my opinion touching and concerning Bridges, Mills, Mil-dams, Mil-stanks, Floudgates, Hecks, Locks and Hebbing-weres, which in the said Statutes be set forth for Lets, Impediments and Annoiances, wherein they are to receive their Expositions according to the said cases of Weres, without other distinctions; for if they have had continuance time out of memory, then are they the proper and peculiar Inheritances of the King, or of his Subjects, allowed by ancient Custome, confirmed by long use, and to remain established without overthrowing or destroying: But if they have been inhaunced or inlarged over their ancient and accustomed assize, then the inlargement and excess is onely to be abated, and no more; for the Statute of 1 *H.* 4. saith, *That there must be left sufficient substance of the ancient*: And if any new Were, Stank, Stake, Floodgate, Kiddel, or other thing have of late been erected on the Rivers, which is an annoiance or hurtfull, then the same may be ordered by the Commissioners to be abated, overthrown, destroyed and pulled down, because the same was erected without lawfull warrant or authority: And so as I take it, these few distinctions do fully declare my opinion touching those matters.

The Statute of 23 *H.* 8. which I read on touching and concerning Lets, Impediments and Annoiances, hath these words in it in effect, *And the Commission giveth authority to*

Edmond

Edmond *Lord* Sheffield, *Sir* Philip Tyrwhit, *Sir* Nicholas Sanderson, *Knights and Baronets*, *Sir* Richard Aurcots, *Sir* John Thorold, *Sir* John Read, Sir Charles Bouls, *Sir* Ralph Maddison, *Sir* William Hanford, *Sir* Francis South, *Knights*, Thomas Tyrwhit, John Bolles, *and* Nicholas Hamerton, *Esquires*, *whereof the said Baronet and Baronets were of the* Quorum, *to survey the Walls, Streams, Ditches, Banks, Gutters, Sewers, Goats, Caleys, Bridges, Trenches, Mills, Mildams, Floudgates, Ponds, Locks, Hebbingweres, and other Impediments, Lets and Annoiances, and the same to cause to be made, corrected, repaired, amended, put down or reformed, as cause shall require, after their wisedoms and discretions; and therein to ordain and do after the form, tenor and effect of all and singular the Statutes or Ordinances made before the first day of* March, *in the* 23*d year of* H. 8. *touching the Premisses, or any of them; as also to inquire by the Oaths of honest and lawfull Men of the said Shire or Shires, Place or Places, where such defaults or annoiances be, as well within Liberties as without, by whom the truth may rather be known through whose default the said hurt and damages have happened; and who hath or holdeth any Lands or Tenements, or Common of Pasture, or profit of fishing, or hath or may have any hurt, lost or disadvantage by any manner of means in the said Places, as well near to the said Dangers, Lets and Impediments, as inhabiting or dwelling near about the said Walls, &c. and Impediments aforesaid; and all these Persons to tax, assess and distrain.*

In a former clause of this Statute, the Commission giveth power to survey the Walls, Banks, Ditches, Gutters, Sewers, Goats, Caleys, Bridges, Streams; In which Clause these as necessary Defences are ordered to be repaired.

Then comes another Clause, wherein these things are reckoned as Lets and Impediments, *videlicet*, Streams, Mills, Bridges, Ponds, Fishgarths, Mildams, Locks, Hebbingweres, Hocks and Floudgates; So that by these two Clauses, the first sort were to be maintained and not destroyed,

and the second sort should have been destroyed and not repaired.

And if these two first Clauses had been alone, then the Commissioners had been bound to maintain the one and destroy the other, without any toleration; but then came in the said third Clause, which is the Clause of moderation, and therein as well the Defences, as the Lets and Impediments, come all in one clause promiscuously put together; and so the words (*amend, correct, repair and put down*) are therein referred to them all; so as in my opinion all Defences, as Walls, Banks, Sewers, Calceys, Goats, &c. be not to be maintained, because in tract of time some may prove unnecessary and unusefull, which for that cause may be pulled down: so all Mills, Mill-dams, Floudgates, Weres, Stanks, Stakes, Kiddels, and such like, are not to be put down and overthrown, but such as are ancient and are thereby grown to be the proper Inheritances of men, and such also which are usefull and necessary are to be maintained, kept and repaired; for in some great Havens and Ports, great abundance of Piles and Timberposts are set in the Waters to stay the rage, force and violence of the Waters for the safegard of the Port and Haven.

It were a very ridiculous exposition of this Law, to urge the Commissioners to overthrow those things which are helpfull, and not hurtfull; for this Statute did foresee, that these Mill-dams, Stakes, Stanks, Floudgates, Weres, &c. were not at all times and in all places hurtfull, and therefore was the said Clause of the Statute inserted, which gave the Commissioners power to put down such as were Lets and Annoyances in truth, and where they were used for strengths and were of good use to maintain the same: And this construction I take it is fully maintained by this Statute, but more especially by the Statute of 7 *Jacobi*, c. 20. where Peres, Piles, Jettles, and the like, set for fortifications and strengths, are expressly ordered to be maintained.

7 Jac. Reg. cap. 20.

And upon this part of this Law I do collect these insuing matters:

First,

First, That if one do erect and build a Were, Mill, Mildam, or other thing on a River navigable, to the hindrance of Navigation; or if there was an ancient Were which was inhaunced of late years, the Commissioners of Sewers are to order him that did erect the one, and he which did inhaunce the other, to pull down the first, and to abate the excess of the other at the costs and charges of the Owner; and if he or his Assigns or Heir, shall contrary to the Decree, Order or Judgment of the Commissioners, after the same hath been reformed, relevy the same again, or do continue the same contrary to order, the punishment of one hundred Marks is to be imposed upon the Offenders, as by the Statute of 1 *H.* 4. and 12 *H.* 4. formerly appeareth. 1. 1 *H.* 4. 12 *H.* 4.

And if one which is a Stranger of his mere malice or own wrong doth pitch down Piles, or set down Stakes in the Rivers and Streams, he is to be fined or amerced for this offence, as the case shall require, and he is to be ordered to remove the Nusans at his own costs and charges; and if it cannot be found out who did the Nusans, then the Commissioners of Sewers are to order those to remove that Annoyance which in all likelihood are to sustain most damage thereby, *Et ita factum fuit*, in 42 *lib. Assiz. plac.* 15. and this Statute extendeth to Rivers and Streams navigable, as well as to such as be not navigable, for Nusances either in the one or the other are within the conusance of the Commissioners; as was resolved in *Hide*'s Case, *Style* 60. But a Nusance in the High-way, though occasioned by the penning up of water is not within their conusance, nor have they any power to meddle therewith; or with any Nusances in the way; And this was the Case of *Hide*, who was indicted before Commissioners of Sewers for that by reason of the penning up of the water in the River at his Mill, 42 *Lib. Assiz.* *Style* 60.

the Banks were overflown, and the High-way annoyed; And the Indictment being removed into the *King's Bench*, was there quashed for that reason.

And touching the removing of Nusances, I shall put the Commissioners some presidents ruled and adjudged in our Books of Law which come fully to the purpose of the matters and things I now treat of.

32 Ed. 3. In 32 *Ed.* 3. *fol.* 8. an Assize of Nusans was brought by *A.* against *B.* for that *B.* had made a Trench over a River, and drew away thereby part of the Waters and Stream another way than that which it did formerly use to run; and thereby surrounded the Grounds of *A.* and the Assize passed for the Plaintiff; and it was adjudged, that the Waters should be removed into the ancient Current and Chanel at the Costs of the Defendant, and the Plaintiff recovered his damages *Et quod defendens capiatur*: out of which case I observe these things:

First, Though an Assize was a private Action, yet the Nusans was *tam querenti quam populo* to the Plaintiff, for drowning and surrounding of his Grounds; to the people, in changing or diverting the ancient course of the Waters, so that for the people the offender was ordered to reform the Nusans, to the King he was fined, and the Plaintiff for his own private wrong recovered his damages.

19 Ed. 3. In 19 *Ed.* 3. *lib. Assizæ, plac.* 6. A Presentment was found by Jury before Commissioners, that certain persons by name had turned the course of the River of *Lee*, which is there termed the Kings Stream, and runs from *Ware* to *Waltham*, and so to *London*, and had fixed and pitched Piles and Stakes therein, by means whereof Boats and Ballangers were hindred in their passages up and down the River, and upon this Presentment it was awarded, that those persons which were presented by name, and which had done part of the Nusans, should reform the same; and because some of the parties names could not be discovered which had done other

ther part of the said Nusans, It was ordered that the Sheriff should be commanded by Writ to him to be directed to reform that part of the Nusans, taking therein to his assistance those persons who had Grounds next adjoining; And *quod defendentes sint in misericordia domi Regis*, because the Nusans was not found to be done by force.

In 19 *Ed.* 3. *fol.* 23. in the Action upon the Case for a Nusans done, the Judgment in part was, That the Nusans should be removed *& cum hoc concordat*, 7 *H.* 4. 8. upon 9 *H.* 4. these three cases I observe.

That be the Action private or popular, always one part of Judgment was, That the Nusans should be removed at the costs and charges of him or them which did it.

Therefore these Cases do fully maintain my Opinion formerly delivered: And although in all the said Cases it appeareth, that there was a legal course taken to remove the Nusances, yet there is another course allowed of by the Law, and that is by abating of the Nusance, in pulling or casting the same down; and the Law is expresse in the point in 9 *Ed.* 4. *fol.* 35. as if it be a Nusance done to *J. S.* 9 *Ed.* 4. he or some other by his directions may overthrow the Nusans; but if it be done *ad nocumentum populi*, as in the high or royal Streams, then any Person prejudiced thereby may abate the same.

The Statute of 23 *H.* 8. 5. doth not extend, nor give authority to the Commissioners of Sewers to reform the great hurt and nusance by reason of the sand rising out of the Sea, and driven to Land by Storms and Winds, as was declared by Parliament *Stat.* 1 *Mar. Chap.* 11. and 1 *Mar.* 11. therefore by that Statute, there was a special provision to enable the Commissioners of Sewers for the County of *Glamorgan* to reform the same, *Co.* 4. *Inst.* 275, 276. But for all other Counties 4 *Inst.* 275. in 276.

in *England*, and *Wales*, the Commissioners of Sewers have no power to meddle therein.

To make a Stream navigable.

BUT it hath been objected to me by way of Interrogation, Can the Commissioners of Sewers make an unnavigable River or Stream to become or to be made navigable by these Laws of Sewers, yea or no? Touching which I shall deliver my Opinion as followeth:

If this could have been done by the Commissioners of Sewers, then what should it have needed to have procured Acts of Parliament for the doing thereof, as 9 *H.* 6. *cap.* 9. to make the River of *Lee* navigable, and 6 *H.* 8. *cap.* 17. a Statute to make the River at *Canterbury* navigable; and in 31 *H.* 8. *cap.* 4. to make the River of *Ex* near *Exeter* navigable: and 27 *Eliz. cap.* 20. to make a River navigable at *Plymouth*; and in 3 *Jac. cap.* 10. for making *Thames* navigable in the Counties of *Oxford*, *Berks*, *Wilts* and *Glocester*? These in truth are good Arguments, but not convincing Proofs; for I am of opinion, that if Streams cannot be made navigable unless there were certain Mills, Weres, Stanks or Kiddels removed which be the Inheritances of private Persons, and have had continuance time out of memory, then directly the Commissioners of Sewers have not power to raze or impair these by the removing thereof, to make the Stream navigable: but in these Cases a new private Act of Parliament must be obtained for the effecting thereof, which was the occasion many of the said private Statutes were obtained: But if none of these inheritable Incumbrances stand in the way, but that by the cleansing or deeper casting of the Chanel the same may be made navigable, Then I am of opinion, the Commissioners of Sewers have power to doe the same, and there be words in our Statute will bear this Exposition (*videlicet*) *And to cleanse and purge the Trenches, Streams, Sewers, Gutters and Ditches, in all Places necessary.*

And

And herewithall I intend to close up this day's Exercise with this short Conclusion; that is, That *E.* was no sufficient Freeman, nor was reliant, nor had Goods of value to make him a competent Commissioner; That notwithstanding *B.* and *C.* and the Countess of *Warwick* were competent Commissioners, and they joining with three of the *Quorum* had power to make and ordain Laws of Sewers; and because this Were was newly erected, therefore the Law and Ordinance made to raze it and to pull it down was a good Law, and warranted by this Statute, &c.

Finis hujus Quartæ Lecturæ.

Lectura

And hereupon I intend to close up this days Exercise with this short Conclusion; that B. was no fubsistent Person, nor was reliant, nor had Goods of value to make him a competent Communion: That notwithstanding A. and C. and the Country of W. were competent Communitors, and they joining with three of the Quorum had power to make and ordain Laws of Sewers; and because this Sewer was newly erected, therefore the Law and Ordinance made to rate it and to pull it down was a good Law, and warranted by this Statute, &c.

Finis hujus Quart. Lecture.

Lecture

Lectura Quinta.

GEnerous Auditors, my Fellows and Friends of this most famous and renowned Inns of Court, I have sailed so far within the Land, that my Ship hath taken up her Harbor in the Inland Streams, and I my self am got up to the highest Mountains, to the end I might take the view and survey of all my former days labours; and this being the last day of my reading, I must now make my accompt to you of my Stewardship: The Talent which was delivered me when I entered upon my first day's Exercise, was this worthy Statute of Sewers, which I have put forth to the best use I could in my poor skill and understanding; But in the casting up of my Accompts, it may be it will come short of your expectations; if it do, I pray you help to increase it out of your abundant store; and consider with your selves, that your Reader took in hand to read upon a Maiden-law, which never before this time abode his Exposition in any Inns of Court, and our Law-books are exceeding scarce in the handling of matters of this kind and nature; and so I wanted those means and helps which many other Readers have had, who have taken upon them to make their readings of Statutes formerly read on, and which have received a more plentifull Exposition in our Books and Terms of the Law than this of mine hath done.

It hath been the ancient custome of this House, for the Reader in his last day's Exercise to make a brief repetition in the manner of an Index, of the most substantial heads of his Statute, and of his divisions: And because every profession is most graced when it is followed and trode out in the steps of learned Predecessors, I intend therefore to be

no Changling, nor mean I to produce or bring up new usages, lest old Customs should forget what her self had been: In this manner therefore do I make my Repetition;

First, I delivered my opinion touching the extent of this Statute, which was as large as the Realm of *England*; and that the English Seas were within the Realm.

I made it to appear, that the Dominion and Empire of these Seas, The legal power of administration of Justice, The property, profit and possession thereof, doth appertain to the King.

And that these Profits { Real and Personal } were of two kinds,

The Real profits were the Grounds relinquished by the Sea, which were always such Grounds as had been always before covered with Waters: But Shores and such Grounds which *Alternis vicibus*, were wet and dry, were not accounted relinquished Grounds, and that relinquished Grounds belonged to the King; but the Shore and casual drowned Grounds might belong to a Subject.

The Personal Profits of the Sea did consist in { Wreck. Flotsan. Jetsan. Ligan; and

great Fishes, which are due to the King by the Royal Prerogative of his Crown; But Subjects might have the Inheritance of the first four by Prescription, and of the last by Charter from the King.

Then I defended into Islands; Which are of two sorts:

First, On the Sea, old ones and new ones, That both were within the King's power, and the new ones his in property.

Fresh Islands in the Land might belong to Subjects; The nature of them all were, that they were *ex digne circumstantiæ*.

Then

I then landed at the Shore, which in definition conteineth those Grounds which extend from the lowest Ebb to the highest Floud; That the King had the property thereof *de Jure*, a Subject might have it *ex perquisito*, and the People had their *usum necessarium*.

I proceeded farther to the Coasts, whose content and contingent I described so near as by Histories I could inform my self; And Shores and Coasts I held them to be *Mare derelictum*.

From these I proceeded to Creeks, Havens and Ports, and these I set forth in their several kinds.

And I concluded with the compass of my Statute and my Commission, and with the diversity thereof, That within the circle of my Statute, Seas, Isles, Shores, Coasts, Ports, Havens, Creeks gained, and relinquished Grounds were comprehended, because that might depend (*in posse*) but yet the Commissioners which was (*in presenti operatione*) did extend but to the utmost Banks and Walls towards the Seas: And I concluded the points of my Case with the difference between Grounds left and Grounds gained from the Seas; and thus I ended my First Lecture.

The Second Lecture.

IN my Second Lecture I came on Land, and took upon me to set forth her Friends from her Foes; her Friends I counted such as had defended her from the violence of the Seas, and from inundation of Salt-waters.

And these were her Friends (*viz.*) Banks, Sewers, Goats, Caleys and Bridges; these are to be maintained and repaired, and are the Defences which I fully treated of.

And these were the Enemies, Streams, Mills, Ponds, Fishgarths, Milldams, Locks, Hebbingwers, Hecks and Floudgates.

These are Lets and Impediments which this Statute speaketh of, and are to be corrected, reformed or put down as cause shall require.

I shewed then that Rivers were of two kinds, Royal and Common Rivers; That there were other inferior kinds of those watery instruments which might take place after Rivers, as Ditches, Gutters, Sewers, Pools, Ponds, Springs.

That Water is the substantive of all these, and if it be a running Water as aforesaid, then it is a stream; if it be a running Water, and pent within Walls or Banks, then it is a River, Gutter, Ditch or Sewer; These in their several kinds I did distinguish; And Springs I held to be the vital spirit of them all.

I then described the Commissioners manner of proceedings, which might be three manner of ways;

1. By view and survey, and wherein they consisted.
2. By Jury, and on what parts that stood.
3. By direction, and the diversities and definitions thereof.

After these I took upon me, by how many several ways the Defences might be maintained, which were nine in number,

1. Frontage.
2. Ownership.
3. Prescription.
4. Customs.
5. Tenure.
6. Covenant.
7. *Usus Rei.*
8. A Townships; and
9. By the Laws of Sewers.

All these I proved by Reasons, Presidents and Authorities, and did at large discourse of them.

Then I came by the course of this Case to treat of Sesses, Taxes and Lays set by Commissioners of Sewers, whereby I found some Inhabitants there were which were subject to these Sesses; as those that follow Houses, Land, Meadow,

dow, Pisture, Woods, Heaths, Furs, Moors, Marishes, Rents, Ferries, Piscaries, Commons, Free passage, Parks, Warrens.

And many Inheritances I found in reason freed from these Taxes and Lays, as Tythes in Spiritual Hands, Annuities, Chases, Pensions, Proxies, Portions, Marts, Fairs, Markets, Offices, things in Action, Conditions, Contingents, Uses, Presentations, Founderships.

I also found these Sesses of three kinds, *viz.*

- Customary, and then they may bind the Mountains as well as the Valleys.
- Hereditary, and then the particular Tenant and the Reversion must both contribute.
- Temporary, which bound the Possessor.

And here I ended my second day's Lecture.

The Third Lecture.

MY Third Lecture I did distribute into three general Heads, which were merely the grounds of the execution of these Laws.

Which consisted either in punishing the Body and Person of the Delinquent with

1. Imprisonment. 1.
2. Fine: and
3. Amerciament.

Or in doing execution upon the Offender's Estate,

1. By distress: or 2.
2. By sale thereof.

Or

Or otherwise in extending it upon a Man's personal Estate, by
- 1. Charging of the Land perpetually; or
- 2. By the absolute sale thereof.

And under these general Rules I comprised these particulars which follow:

First, For the Honour of this Commission, and for the more necessary execution of these Laws, I found them out a Court, wherein I set forth in what Cases Commissioners might imprison the Bodies of Delinquents, and in what Cases they might impose a fine, and when amerciaments be due; and then I shewed that for some transgressions neither imprisonment, fine nor amerciament was to be imposed.

I then came to Distresses, and held a treble distinction of them (*videlicet*) that some were
- 1. Judicial, and issued out of the Judicial Records of this Court.
- 2. Other Ministerial.
- 3. The third Legal; wherein all these Diversities I screwed out by proved Authorities.

Then I shewed in what places these Distresses might be taken, when upon the Land charged, when within any place within the extent of this Commission, and sometimes within any place of this Realm; And when the proper Goods of the Party might be taken, and when the Goods of Strangers, and when Goods may be sold by this Law.

Afterwards according to the order prescribed me by my Case, I declared that there were some Interrupters to the execution of these Distresses.

The one was by suing Replevins, wherein I took these diversities.

That a Sheriff being an inferior Officer could not of his own power deliver a distress taken by warrant of Sewers; But that the Commissioners of Sewers are bound to obey a Replevin coming out of the King's Courts at *Westminster*, *Quia de altiori natura*; Thus yet notwithstanding Goods taken by a judgment were exempted from that Replevin.

Then I proceeded to the charge of Lands, whether a perpetual charge might be imposed, or not.

And from thence I came to Sales, and those I distributed into four points;

1. For what cause.
2. What Lands.
3. Whose Lands.
4. To whom these Lands might be sold.

I after came into the Tractate of Legal Proceedings, which may be used in our Court of Sewers; and first when and which Presentments of Sewers are traversable, and which not.

And then wherein a Party wronged may have his justice in this Court, and in what cases not.

And whether the first words of the Statute would admit of Exemptions, and the difference of them, that some were general, others special; and therein I ended the Third day's Exercise.

The Fourth Lecture.

THE fourth day I treated of the Ability and Non-ability of the Commissioners, either by reason of some personal defect, whether it consisted in Sex, Exile or other Impediment that way.

And what Estate and value of Lands made one a competent Commissioner, and what did the contrary; and the times when the Commissioner must have this Estate.

Then

Then I delivered my opinion upon the words of the Statute, which be valuable Hereditaments to inable a Commissioner, and which were not.

Then I proceeded to intreat of a Commissioners Ability in Goods and moveable substances, and which were moveable substances within this Statute, and which not.

And because in the Citizen-Commissioner Three things were required to make him able (*viz.*) Freedom, Estate in goods, and Residency, I therefore handled fully all these parts thereof.

After all which, because I had before this time no fitting opportunity to treat of Lets and Impediments, I therefore in this Lecture disposed my self in such sort as it took hold of them all.

And First, Because the Statute I read on confirmed all other former Laws concerning the same, I therefore repeated them all from *Magna Charta* to this very time, and gave an Explanation or Declaration of them all.

I then distributed the learning of these Laws into three Heads:

1. First, That these which had the strength of a Custome, and were grown to be particular Inheritances of private persons, could not be extirped.

2. Secondly, And whereas some were newly erected without Authority, they might be overthrown.

3. Thirdly, And whereas some were ancient, and were exalted above or beyond the ancient Assize, the excess might onely be abated; with these differences I satisfied these Statutes.

Then came I to our Statute I read on, and therein I took new diversities that was upon the Three Clauses of my Statute.

1. The First did maintain the Defences.

2. The Second destroyed the Offences.

3. And the Third was a general Clause, reciting the Defences and Offences together, and did give the Commissioners power to reform or amend, repair or put down, as cause should require.

Wherein

Wherein I publiſhed this learning thereupon, That if an old Wall, Bank, Bridge or other Defences, were found to be out of uſe, it might be extirped.

And if a Were, Mill, Milldam, Stanks, Stakes, Piles, or Floudgates were found beneficial to the publick good, they might be preſerved and maintained.

And I vouched ſome preſidents, at whoſe charges the ſaid Lets and Impediments ſhould be removed, and I ended my Argument with this, In what caſes Commiſſioners of Sewers might make unnavigable Rivers navigable, and where not; and in that I concluded my fourth Exerciſe.

This is the extent of my accompt, wherein I think I have done my ſelf ſome wrong in making ſo ſhort a Breviate, in omitting many things which I truly took pains in; but becauſe you were all preſent and privy to my layings out, I hope though I have omitted them in my extreats, you will allow me them in *Summa totalis*.

But by your good favors I intend not to break Cuſtome or Promiſe in any things for I have ſome ſtock more left, which I told you when I began I had caſt under hatches, which now alſo I mean to diſtribute amongſt you; And becauſe there is ſome part of this as yet left untreated of, I will now therefore proceed to the unfolding thereof.

And the ſame conſiſteth in theſe words of the Law, *That the Commiſſioners hereafter named in any Commiſſion, according to the purport of the ſame, have full power and authority to make, conſtitute and ordain Laws, Ordinances and Decrees, and the ſame Laws and Ordinances ſo made to repeal, reform, amend and make new, as the caſes neceſſary ſhall require in that behalf.*

So that whereas other Judges have power onely *Jus dicere*, theſe Commiſſioners have alſo power *Jus facere*; yet this Statute gives not the Commiſſioners of Sewers abſolute power and authority to make and ordain Laws but *ſecundum quid*; for theſe Laws which they are to make, muſt be for the ſafegard, conſervation, redreſs, correction and reformation, and more than theſe; they muſt be neceſ-

sary and behoveful; so they must not be made out of self-will, and affection, but after their Wisedoms and Discretions.

Wherein I conceive, that never a Sentence in this Statute is seasoned with more variety of Caveats and grave directions than this Statute is in this very clause of making new Laws; so that these Laws ought to be made to amend, not to make worse; they must be necessary, not nugatory, they are to be compiled with Wisedom, and disposed of with good Discretion, and they ought chiefly to be made *pro bono publico*, and not *Pro private dilectus*.

New Laws are to be ordained for these purposes onely, that is, either for making and erecting of new necessary Defences, or for the overthrowing of some unnecessary Lets and Annoiances, or for the continuance of the Ancient.

And in alteration, new addition, or diminution of a Wall, Bank, Sewer, Goat, Calcy or other Engine, a new Law is to be made for the effecting thereof.

Also if an ancient Wall, Bank or other Defence be worn out of use, and is altogether unnecessary; but in the Wisedom and Discretion of the Commissioners, and that a new one in another place were more convenient for the safety of the Countrey; this must be all done by a new Law.

But here a matter of Law will arise, and another matter of great caution: The matter of Law will rest in this, Whether an ancient Wall, Bank or other Defence which is grown out of use, may be overthrown and pulled down; and in my opinion it may, by the said third clause of the Statute, wherein power is given either to maintain them or to put them down.

But because I have formerly handled this point, I will therefore proceed to the caution which is of great weight and importance; for whereas one or more persons are by Tenure, Covenant, Custome, Prescription or otherwise bound and tied to repair and maintain the said ancient Bank, Wall,

Wall, Sewer, or other Defence at their ſeveral and peculiar charges; if then the Commiſſioners of Sewers ſhould make a Law to overthrow or remove the ſame, and ſhould execute the ſame accordingly; and then ſhould make a Law to erect and build a new Wall, Bank or other Defence in another place more convenient, yet the parties which were bound to maintain and repair the former old Defences, ſhould not ſo be tied and bound to repair and maintain theſe new erected ones, becauſe by the deſtroying of the ancient Walls and Banks, the Preſcriptions, Cuſtoms, Tenures and Covenants were either utterly diſſolved, or otherwiſe ſuſpended; and the charge for the erecting and maintaining of the new ones are to be laid on the Level: So that it behoveth Commiſſioners to be carefull in theſe affairs, elſe things in the Concluſion may fall out contrary to their expectations; for it is well ſaid, That *Rerum progreſſus oſtendunt multa quæ in initio nec prævideri aut præcaveri poſſunt.*

In making new Laws and Ordinances theſe things are alſo conſiderable;

First, What the matter of the Law is which is to be enacted. 1.

Secondly, When the matter is known, then to weigh it well, whether if it be made, if then it will prove neceſſary and behovefull for the good of the people; and this neceſſary point is to be ſcanned by the Counſel and advice of the moſt diſcreet and experienced perſons, and of the beſt tried judgments in matters of this nature. 2.

And Thirdly, to conſider what charge the work will coſt, for the which this Law muſt be made; for in Scriptures he is not counted ſapient that before he build a houſe will not firſt count the charge of it. 3.

And Fourthly, What perſons muſt bear this charge, leſt it prove too burthenſome; and this muſt be directed by the ability of the people which are to be charged, and by the ſafety and commodity they are to have by the work. 4.

I observe also that this Statute useth three words, which are all powerfull in signification and operation, *videlicet*, *Laws*, *Ordinances* and *Decrees*; and I think it fitting for me, so near as I can, both to deliver the definitions of them, and the differences between them.

A Law.

A Law is properly a matter which hath taken his essence and power by a Custome time out of memory, as the Commonlaws have done; Or else is a matter acted and enacted in Parliament by the King and the great Counsel of the Realm, and by the Authority thereof, for the ordering of mens Bodies, Lands and Goods; and such a Law is hereby intended, because the Laws which the Commissioners shall make have the power of an Act of Parliament to strengthen and assist them, and they are to receive life and perfection from this Statute I read on.

Ordinance.

AN Ordinance is a word having a more private and less powerfull signification than the word *Law* hath; for it is a Law but of a secundary power, enacted by a Corporation, Company or Commission, proceeding meerly out of the Power and Prerogative of the King by Charter, Grant or Commission warranting the same, as those Corporations, Societies and Companies which have power by Charters or Patents to make the same; as is set forth in the cases of the City of *London*, and of the Chamberlain of *London's* Case in Sir *Edward Cook's* Reports.

Case of the City of London.

Case of the Chamberlain of London.

Also Ordinances may be made by the power of a Court, as in a Court Baron to make Orders, or by the Inhabitants of a Town by Custome, for the ordering of their Commons, repairing of their Churches and Highways: And these are more properly By-laws than Laws; for a Law is either the Commonlaw, Customary-law, or an Act of Parliament;

liament; all which are of greater force than any Laws made by these secundary means, which of themselves are of little or no strength but as they are assisted by other primary powers.

Decree.

A Decree is neither a Law nor Ordinance in proper definition, but is onely a Sentence or Judgment in a Court of Justice, delivered or declared by the Judges there, by and through the power and strength of a general former Law; for *Decretum est Sententia lata super Legem.*

So that a Law is a general direction for a multitude.

An Ordinance is a subordinate direction, proceeding out of a more general power.

And a Decree is a Sentence delivered for or against a particular person, grounded upon the said Laws and Ordinances.

Continuance of Laws.

IT comes now fitly for me in turn and course to declare the continuance of these Laws, Ordinances and Decrees; for it is to be observed that some of them be but temporary, though others perpetual.

The words in our Statute are, *That every Statute and Ordinance made before the Statute of* 23 *H.* 8. *concerning the things and matters therein mentioned, as well in the time of* H. 8. *as of any of his Progenitors, not being contrary to this Statute, or heretofore repealed, shall stand in force for ever, and are commanded to be put in due Execution.* But this clause is intended of all Acts of Parliament made touching the Sewers, and be not intended or meant of Laws and Ordinances made by the Commissioners of Sewers themselves.

Laws

Laws and Decrees made for ſale of Lands by the Powers and Authorities of this Statute, are to be made and ingroſſed into Parchment, and certified under the Seals of the Commiſſioners into the Chancery, and the King's Royal Aſſent had thereto, under the Privy Seal, ſhall alſo ſtand good and effectual.

And all Laws and Ordinances written in Parchment, and indented, and under the Seals of the Commiſſioners, whereof the one part ſhall remain with the Clerk of the Sewers, and the other part to remain in ſuch places as the Commiſſioners ſhould appoint (notwithſtanding the ſame be not certified into the Chancery, nor the King's Royal
23 El. cap. 9. Aſſent be had thereto) ſhall continue in force till the ſame ſhall be altered, repealed or made void by another Commiſſion of Sewers, although the former Commiſſion by the which theſe Laws were made were determined by *Superſedeas*.

The Commiſſion is to continue for ten years from the
(13 Eliz. date thereof by force of the Statute of 13 *Eliz.* yet notwithſtanding all Laws and Ordinances which are written in Parchment, indented and ſealed by the Commiſſioners of Sewers, without certifying into the Chancery, or the King's Royal Aſſent had thereto, ſhall notwithſtanding the determination of the Commiſſion by the Expiration of the ſaid ten years, continue in force for one whole year next enſuing, to be put in Execution for that time by ſix Juſtices of the Peace, whereof two to be of the *Quorum*, but then the power of the Juſtices of the Peace is ceaſed by the coming of a new Commiſſion of Sewers.

All other Laws and Ordinances of Sewers which are but made and writ in Paper, or which be but in Parchment, and not Indented, or which be Indented alſo, if not ſealed, continue in force no longer then that Commiſſion continueth by the Power whereof they were made.

And ſo by this ſhort Declaration I have made, the Commiſſioners may the better obſerve how long time Laws and Ordinances of Sewers are to continue in force; yet though they

they lose their vigor they may notwithstanding be revived by the power of a new Commission, or remain for presidents for after Ages to imitate.

Repealing of Laws.

IN this last Place I intend to deliver my Opinion, what Laws, Ordinances and Decrees may be repealed, altered or made void by the Commissioners of Sewers.

Therefore it is first to be considered, what Grounds are to be observed in repealing or altering former Laws.

It appears in *Esther*, that the Laws of the *Medes* and *Persians* were so perdurable, as they could never be changed: And in my Opinion there is required as great foresight, Judgment, and as sound discretion and mature deliberation in repealing of old Laws, as in making new ones; For *Quæ preter consuetudinem & morem majorum fiunt neque placent neque rella videntur.*

I have noted how carefull and constant the Lords of the Parliament house were in the 20 year of *H.* 3. when they all cried out aloud *Nolumus leges Angliæ mutare.*

Seeing therefore there ought to be great care in making Laws, so must there be great heed taken in repealing of Laws.

And because Commissioners of Sewers have power herein, I will therefore deliver my Opinion how far that power will extend: And if one note this Branch of the Statute well, he shall well perceive the Judicious care taken by the Parliament in penning of it; For the words be, *That the Commissioners of Sewers should have power and authority to make, constitute and ordain Laws, Ordinances and Decrees, and the same Laws and Ordinances* (omitting the word Decree) *to alter, repeal and make void*; for a Decree is a Judgment, and is *Finis rerum*, and a Judgment cannot be reversed without a Writ of Error: Neither can a Sentence or a Decree in Chancery be reversed without a Bill of Review; neither can the Commissioners of Sewers reverse a

Judg-

Judgement or Decree of Sewers Judicially pronounced, which is a Judgement upon a Tryal betwixt the King and the party, or betwixt party and party, without a Bill of Reversal; for it is truly said, *Quod naturale est unumquodque, dissolvi eo ligamine quo ligatum est.*

A Writ of Error lay at the Commonlaw for to reverse a Judgement given by Commissioners of Sewers when the Commission was in Latine, as is set forth in the Register, being then one of the special Commissions of *Oyer* and *Terminer*; but since the Commission was put into the English Frame, the Writs of Error ceased.

A Law for sale of Lands ingrossed into parchment, and certified into the King's Court of Chancery, with the King's Royal Assent had thereto, is not reversable without an Act of Parliament; but then the said Sale must be made according to the Form, Frame and Power of this Statute.

For put the Case that *A. B.* holdeth his Lands of *J. S.* by the payment of Twenty Shillings yearly towards the repair of such a Bridge Bank, or Wall, it fortuneth that *A. B.* paid the Twenty Shillings yearly to his Lord for that purpose, who neglecteth to pay it, though he be thereto ordered and assessed to pay the same to the said repairs by the Commissioners of Sewers, the Seigniory of Twenty Shillings yearly is to be decreed, and not the Land, for that the fault was in *J. S.* and not in *A. B.* the owner of the Land.

If any persons be by prescription, Custome, Tenure, Covenant or otherwise, bound to repair Walls, Banks or other Defences of Sewers, the Commissioners have not any power by their Commission to repeal, alter or make void any of these, because these are established by the Commonlaw, and Customs of the Realm, and not by the power of the Commission of Sewers: But their power is to repeal, alter or make void Laws and Ordinances made by themselves, or by the power of their Commission: And so the words of their Commission plainly describe it; For thereby they have power to make Laws and Ordinances, and the same to repeal, alter and make void, so they must be the same

and

and no other: And herein I end all my arguments and discourse upon this Statute, for I accompt all the rest which remaineth unspoken of not to be worthy of a Reader's dislike, because I have fully handled all the Materials of this worthy Law. And therefore I may justly conclude my argument with this, That *Finitum est hoc opus & consummatum.*

Certiorari's and Returns.

ALthough by the Statute of 13 *El. cap.* 9. it is enacted, That the Laws and Ordinances of the Commissioners of Sewers shall continue in force as therein is appointed, and that the said Commissioners, or any of them shall not be compelled or compellable to make any certificate or return of any their ordinances, Laws, or doings by the authority of any the said Commissions, nor shall have any Fine, Pain or Amerciament set upon them or any of them, or any ways be molested in Body, Lands or Goods for that cause; yet the Court of King's Bench do not take themselves to be restrained by those general words. And it was said by the Judges there, in the case of *Smith* and others, *Hil.* 21 & 22 *Car.* 2. that it was never doubted but that the Court of King's Bench might question the legality of the Commissioners of Sewers orders notwithstanding that Statute; for it shall not be ousted of its jurisdiction, by general words in an Act of Parliament, without express and particular words; *Modern Reports* 44, 45. And in the

13 Eliz. c. 9.

Modern Reports 44. 45.

the Case of *Comins* and *Massam*, *Pasch.* 18 *Car.* 2. *B. R.* If the Commissioners of Sewers proceed where they have no jurisdiction, or without Commission, or contrary to their Commission, or not by Jury (where a Jury is requisite) &c. their doings may be examined and corrected in a superior Court, *March* 197, 198.

March 197, 198.

And accordingly Writs of *Certiorari* have been from time to time as well since as before the said Statute of 13 *Eliz.* granted to remove into the *King's Bench*, their Orders and Proceedings, and Presentments taken by them; and such Orders, Presentments and Proceedings have been quashed there. See *Style* 13, 60, 85, 185, 191, 198, *Siderfin* 1. 145. And the Commissioners of Sewers have been brought into that Court by Attachment, and there fined, for proceeding to fine a Person, after a *Certiorari* was delivered to them, *Modern Reports* 44, 45. And that Court have taken upon them to confirm a Decree of the Commissioners of Sewers; *March* 201. And have confirmed their Order for part, and quashed it for other part, *Siderfin* 1. 145. And may moderate a fine set by the Court of Sewers, *March* 202.

Style. *Siderf.* 1. 145. *Modern Reports* 44, 45. *March* 201. *Siderf.* 1. 145. *March* 202.

And whereas it hath been objected, that the Statute of 23 *H.* 8. c. 5. hath appointed the Orders and Proceedings of the Commissioners of Sewers to be in English, and consequently hath taken

23 *H.* 8. c. 5.

away the *Certiorari*, for that the Court of *King's Bench* can judge onely of Proceedings in Latin; to which Opinion *Mallet*, Juſtice *B. R.* ſeems to incline in the Caſe of *Commins* and *Maſſam*, *Paſch.* 18 *Car.* 1. It was reſolved, that a *Certiorari* to the Commiſſioners of Sewers lies ſince that Statute, and is not taken away thereby, *March* 197, 198, 199. *March* 197, 198, 199.

In *Apſley's* Caſe, 17 *Car.* 1. *B. R.* where certain Orders made againſt him by the Commiſſioners of Sewers at *Weſtminſter* were removed by *Certiorari* into the Court of *King's Bench*, theſe Exceptions were taken to the return. 1. It doth not ſay, that the Commiſſion of Sewers was under the Great Seal. 2. It appears not that three of the Commiſſioners who made the Orders were of the *Quorum*, as the Statute of 23 *H.* 8. 5. appoints. Nor 3. That the Place touching which their Orders were made was within *Weſtminſter*, and ſo it cannot be known whether it was in their power by virtue of their Commiſſion to make any Orders touching that Place; And for theſe defects, the return was adjudged ill, and the Proceedings of the Commiſſioners were quaſhed: And though *Hales* moved for liberty for the Commiſſioners to amend their return, it was denied by the Court, becauſe the Return was made the term before, *Stile* 85. 23 *H.* 8. 5. *Stile* 85.

away the *Certiorari*, for that the Court of *King's Bench* can judge onely of Proceedings in Latin; to which Opinion *Mallet*, Justice *B. R.* seems to incline in the Case of *Cummins* and *Massam*, *Pasch.* 18 *Car.* 1. It was resolved, that a *Certiorari* to the Commissioners of Sewers lies since that Statute, and is not taken away thereby, *March* 197, 198, 199.

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